Supreme Court, U.S.
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No. _____

In the Supreme Court of the
United States
October Term 1991

Leary Cox, Petitioner

vs

The State of Texas
The Texas Supreme Court

Petition for Writ of Certiorari
To The Texas Supreme Court

Name: Leary Cox (Pro-se)
Address: 26106 LaFouche
Tomball, Texas 77375
Telephone: (713) 351-7865

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U.S. Supreme Court
October Term, 1991

Question #1.

(a). Whether Texas Rules of Appellate Procedure No. 133 (a) and paragraph 6 of Section 22.001(a) of Texas Government Code violates an individual's federal constitutional rights to due process, equal protection and access to the courts when this rule empowers the Texas Supreme Court to deny an application for writ of error when it is not satisfied that the Texas Court of Appeals has correctly declared the law in all respects but is of the opinion that the application presents, (1) no error of law which requires reversal or, (2) which is of such importance to the jurisprudence of the state. Whether or not neither of each condition (1) or (2) has not been statutorily defined.

(b). Whether the lack of such definition creates a discriminatory environment contrary to the provisions of the federal constitution guaranteeing equal treatment under law.

Question #2

Whether Texas Rules of Appellate Procedure #133(a) is constitutionally valid, viable and enforceable when the creation of this rule exceeds the Texas Supreme Court's grant of authority under Texas Government Code; Title 2, Subtitle A, Chapter 22 Subchapter A Section 22.004(a) authorizing that...the Supreme Court has full rule making power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge or modify the substantive rights of the litigants.

When the rule contradicts and denies a substantive right to appeal under Section 22.001(A)(2) of the same code.

(Texas Government Code).

Question #3

Whether a substantive right to appeal is granted by and is invoked under Texas Government Code Title 2, Subtitle A, Subchapter 22, Section 22.001(A)(2)

....the Supreme Court has appellate jurisdiction except in criminal law matters, coextensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgements of the trial court.

(A)(2)...a case in which one of the courts of appeals hold differently from prior decision of another court of appeals or of the Supreme Court on a question of law material to a decision of the case.

Question #4

(a). Whether Texas Supreme Court may selec-

tively administer a mandatory jurisdictional grant to hear cases which are invoked under Texas Government Code Section 22.001A items (1) through (5).

(b). Whether rule 133(A) is unconstitutionally selective and discriminatory and condones obvious and blatant errors by lower courts as to create a denial of due process.

Question #5

Whether a verified denial under Texas rule of pleading creates a substantive right that allegations made against a defendant be proven to support a judgement in a cause of action.

Question #6

Whether Texas Non Profit Corporation Act Section 1396 2 23 (b) confers a substantive property right to a member of an association to inspect the books and records of the association.

Question #7

Whether Texas discovery rule creates a substantive liberty and property right to pursue a timely cause of action when an injury is discovered rather than the date the action occurred giving rise to the injury.

Question #8

Whether Texas Rules of Civil Procedure #215(2)(b) and 167(1)(c) creates a substantive right which the court violated by granting sanctions without a hearing on just cause, absent of a failure to comply with a proper discovery request or order to provide or permit discovery as mandated by these rules.

Question #9

Whether Texas Rules of Civil Procedure #13 creates a substantive liberty right which the court violated when it entered sanctions against petitioner without good

cause and without the presumption that all pleadings, motions and other papers are filed in good faith and further, failing to state the particulars in the sanction order as mandated by this rule.

Question #10

Whether the imposition of sanctions against a defendant brought into court on a fictitious allegation has suffered an infringement of a substantive liberty right when the charges are unsubstantiated and default judgement improperly entered on sanctions.

Names of All Parties

Leary Cox, Petitioner

Boudreaux Civic Association, Inc., Respondents

Brenda Tolleson

Susan Hughes

Dianne Trimm

Larry Trimm

Pat Prejean

Dwayne Prejean

John Walton

Sissy Doyle

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35 *Griffin v Illinois* 76 S.Ct. 585-91 (1956)

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37 *Hewitt v Helms* 103 S.Ct. 864, (1983)

47 *INRE Subdivision 6 of Supreme Court Jurisdiction* - Act of 1917, 201 SW 390 at 395

57 *Illinois v Gates* 103 S.Ct. 2317, 2321

37 *Kentucky Dept. of Corrections v Thompson* 109 S.Ct. (1989) page 1909, 1910

52 *Linken Hogen v Am. Fidelity* 266 S.W.2d 884-6 (Tex.Sup. 1983)

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50 *Texas Society v Fort Bend Chapter* 590 S.W.2d 156 (Tex.Sup. 1979)

47 Texas Legislature Act of March 25, 1927 Chapter 144, Sect. (1) (1927). General and Special Law 214 - 216.

57 *Vachon v State of New Hampshire* 94 S.Ct. 665 (1974)

52 *Weaver v Witt* 516 S.W.2d 792-94 (Tex-Sup. 1977)

A REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINION DELIVERED IN THE CASE

The Texas Supreme Court has denied the Association's request to publish the opinion and judgement of the First Court of Appeals. Consequently the fact and law applicable to the case may not be cited as authority as provided under Rule 91(i) of Texas Rules of Appellate Procedure. Other courts' treatment of similar fact situations are so strikingly different as to elevate this case to establish a new rule or novel application of existing law. But still fails to meet the standard for publication.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the Texas Supreme Court as provided under 28 USC section 1257, this being a final decision made by the highest court of the state. In this regard any

challenge to the constitutionality of the rule authorizing a specific decision by the Texas Supreme Court is uniquely the jurisdiction of the U. S. Supreme Court. A challenge may only be raised when petitioner has a standing to do so by virtue of a decision adverse to petitioner. Thus a constitutional challenge to the rule could only be initiated subsequent to the Texas Supreme Court's application of the rule giving rise to an adverse decision.

This Court in *National Socialist Party of America v Village of Skokie* 97 S.Ct. 2205 (1977) confirmed its jurisdiction, granted certiorari and reversed a final judgement of the Illinois Supreme Court which was separable and collateral to the merits on the grounds that such a denial left in place a lower court's injunction which deprived petitioner of substantive rights under the provision of the U. S.

Constitution. In this case the decision of the Texas Supreme Court is unconstitutional because it denies a statutory right to an appeal. See Texas Government Code, Title 2, Subtitle A, Subchapter 22.001 (A) (2). And in addition leaves in place a series of denials of substantive property rights at the trial court's level. Such as the denial of due process by the imposition of sanctions without a hearing, just cause, or authority to do so contrary to Texas Rules of Civil Procedure #215(2)b and 167(1)c, (1988). The denial of a statutory right to review books and records of a non-profit corporation, Texas Non-Profit Corporation Act article 1369 2 (23)b. Departure from local practice requiring ten days reasonable notice for a deposition. See *Brohmfalk v Linwood*, 742 S.W.2nd 518 at page 520 (Texas Civil Appeal 1987). And an injunction against the free hold of private

property because of an unconstitutional denial of equal treatment and protection, because of petitioner's black race and color. See *U.S. 42§1981*. And that petitioner chose to appear pro se as provided by Texas Rules of Civil Procedure #7.

Statement of Jurisdiction

This Court has jurisdiction under:

(1) 28 USC 1257, (A)

(2) 42 USC 1983,

Date of Entry of Judgement

September 5, 1991

Rehearing Denied

October 16, 1991

Statutory Provisions

Conferring Jurisdiction

(1)

28 USC § 1257, State courts; certiorari

(a) Final judgements or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by

the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(2)

42 USC § 1983 Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United

States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Statutes & Rules Involved

42 USCS § 1981

§ 1981. **Equal rights under the law**

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make an enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by

white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, an to no other. (R.S. § 1977.)

Texas Government Code, Section 22.001(A) 2 & 6, 22.004 (A).

§ 22.004. Rules of Civil Procedure

(a) The supreme court has full rule-making power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.

§ 22.001. Jurisdiction

(a) The supreme court has appellate jurisdiction, except in criminal law matters, coextensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgement of the trial courts:

(2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;

(6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.

Texas Rule of Appellate Procedure

RULE 133. ORDERS ON APPLICATIONS FOR WRIT OF ERROR

(a) Notation on Denial of Application. In all cases where the judgement of the court of appeals is correct and where the principles of law declared in the opinion

of the court are correctly determined, the Supreme Court will refuse the application with the docket notation "Refused." In all cases where the Supreme Court is not satisfied that the opinion of the court of appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, or which is of such importance to the jurisprudence of the State as to require correction, the court will deny the application with the notation "Writ Denied." In all cases where the Supreme Court is without jurisdiction of the case as presented in the application, it will dismiss the application with the docket notation "Dismissed for Want of Jurisdiction." The Court may accompany the denial of an application with such explanatory remarks as it may consider appropriate.

RULES OF CIVIL PROCEDURE

Rule 215

2. Failure to Comply with Order or with Discovery Request

b. *Sanctions by Court in Which Action is Pending.* If a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under paragraph a of this rule or Rule 167a, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:.... (in part)

RULES OF CIVIL PROCEDURE

Rule 167(1)(c)

(c) The REQUEST shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The REQUEST shall specify a reasonable

time, place and manner for making the inspection and performing the related acts.

Rule 166

Summary Judgment

(b) **For Defending Party.** A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** (in part)

The Judgment sought shall be rendered forthwith if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response.

Rule 13. **Effect of Signing of Pleadings, Motions and Other Papers; Sanctions**

Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order.

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. CONSTITUTION

Article 6 Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment V. (In part):

...No person shall be deprived of life, liberty or property, without due process of law...

Amendment XIV. (In part):

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

A CONCISE STATEMENT OF THE FACTS MATERIAL TO THE QUESTIONS

Boudreaux Civic Association, Inc. brought action in the state court alleging that Leary Cox, petitioner, violated deed restriction. The court found no violation but awarded sanctions and a default judgement against petitioner for exercising a

statutory right to review the association records, complying with a court order and failing to respond to inadequate notice of three days for deposition when ten days reasonable notice is required. The trial court granted an injunction against the use of his property, attorneys fees, interest and court costs. Petitioner appealed to first court of appeals, they affirm and an appeal was made to the Texas Supreme Court who refused to hear the case on grounds that it was of no interest to the state. Their decision is final. Petitioner now questions the constitutionality of the Texas Supreme Court action, and the Judgement of the courts below.

This brief background is intended to show this court that issues of law material to the decision exist. And that their proper application would bring about a different decision. Also that a lack of

their application constitutes discrimination. The court acting under color of law has denied petitioner a federal right and by their judgement has caused damage. The improper dismissal of this appeal by the Texas Supreme Court only condones the damage. The court has denied a request to publish its decision. This case needs the supervision of the U.S. Supreme Court.

1). On June 24, 1988 Boudreaux Civic Association, hereinafter referred to as B.C.A., filed suit against petitioner alleging (TR 2) that his unlicensed cars violated deed restriction prohibiting inoperable cars. B.C.A. did not test the vehicle for operability. Petitioner answered by verified denial and took special exception to the allegations (TR 25), requiring B.C.A. to prove their case under Texas law. *Nutting v. National Home Mfg. Co.* 639 S.W.2d 721 (TX Civ. App. 1983).

Unable to do so, B.C.A. requested inspection under discovery provision of Texas Rules of Civil Procedure, hereinafter referred to as T.R.C.P., but failed to meet the mandatory provision of Rule 167.1.(c) requiring a statement of time. place and manner for the inspection. Petitioner objected, but the trial court issued an order authorizing inspection, sanctions, and attorneys fee without a hearing. B.C.A. did not request a mechanical inspection to determine operability which is the basis of the law suit and the trial court did not grant one. Petitioner refused to submit a mechanical inspection since none was ordered and he made a verified denial of the allegations.

2). On August 30, 1989 the trial court denied petitioner a statutory right to inspect all books, papers and records of B.C.A. (TR 207) as provided by Article XV

of the bylaws of the Association (TR 634) and Texas Non-profit Corporation Act 13962-.2:23(B) (TR 635). Petitioner objected, to no avail.

3). On September 8, 1989, the trial judge of the 60th District Court recused himself three (3) days before a scheduled hearing contrary to T.R.C.P. #18(A) requiring at least ten days notice by B.C.A. who filed their motion on September 5, 1989.

4). On November 17, 1989, the 80th District Court ruled that petitioner could have raised his counterclaims at a prior suit in February 1983, when his cause of action arose in June 1985, and granted B.C.A. partial summary judgement when there existed genuine issue of material facts, which should preclude such a grant. (TR 372).

5). On December 15, 1989, 80th District Court struck petitioner's pleading and

granted default judgement without just cause contrary to T.R.C.P. #215, alleging that petitioner failed to allow a mechanical inspection when NONE was ordered by the court; that petitioner abused the discovery process by seeking to exercise a statutory privilege, to review the books and records of B.C.A.; that petitioner failed to appear for a deposition on three days notice, when reasonable notice of ten (10) days is required. And that petitioner filed frivolous motions and responses. The Court has not entered any particulars in support of this allegation which is required prior to imposition of any sanction. Rule 13 T.R.C.P.

6). On February 9, 1990, the 80th District trial judge failed to recuse himself on petitioner's motion (TR 691) after his statement to "go get a lawyer or lose your house," contrary to T.R.C.P. #7 providing

that any party may appear in person to defend a suit.

7). On March 30, 1990, the trial court granted permanent injunction and awarded attorneys fees and costs in excess of $22,000.00 without any evidence or proof that petitioner caused damage by violating the deed restriction (TR 738). Texas law requires that no injunction be issued by any court unless evidence supporting same is proved in favor of current or imminent damage. The trial court at trial acknowledged and documented in the records that no violation of the restriction occurred (see "Statement of Facts" page 68 lines 3 through 12) and did not award civil damages as provided in cases of violation of deed restriction. Yet entered an injunction and attorneys fees and court costs as sanction. A question of law exists as to the propriety of the sanctions and on every issue

raised to justify such a grant. A question of law exists as to why petitioner was treated differently as reflected in decisions made by other trial courts, courts of appeals and the Texas Supreme Court. The court of appeals affirmed.

Petitioner's application contains issues of law material to the case. From the synopsis presented it is clear that petitioner has been denied due process. This Court has jurisdiction under 42. U.S.C., § 1983 to grant relief by ordering the Texas Supreme Court to hear the appeal as mandated under the Texas Government Code and guaranteed under the U.S. Constitution.

The decision of the Texas Supreme Court is final and petitioner is faced with an actual injury that is sufficiently distinct to invoke the authority of this Court. Moreover the court's decision has caused an altering of petitioner's property

right to hold and use his land free of the supervision and injunction entered by the trial court. And in so doing denied petitioner a statutory right to an appeal.

* * * *

In the United States Supreme Court

October 1991 Term

Petition for Writ of Certiorari

To the Honorable Supreme Court:

Now comes Leary Cox, petitioner, and files this application for Writ of Certiorari to review a decision by the Texas Supreme Court and the constitutionality of the statute under which such a decision was made. And would show that the State of Texas through the Texas Supreme Court has violated petitioner's constitutional right to due process, equal protection under U.S. Constitutional Amendments five and fourteen. *Griffin v. Illinois*, 76.S.Ct. 585-91 (1956).

I.

On May 30, 1991 petitioner filed an application for writ of error in the Texas Supreme Court under provisions of Texas Government Code subsection 22.001(A) (2) which grants jurisdiction and mandates a hearing in "cases in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the Supreme Court on a question of law material to the decision of the case." This is a substantive property right in favor of the petitioner which cannot be selectively denied by the Texas Supreme Court. Fourteen points of error were presented to the Texas Supreme Court, all basically constitute the denial of statutory right under Texas law. This court has held that the adoption of a statutory or regulatory rule confers a substantive property right when the language is of a

mandatory character. And failure to comply with this mandatory provision is a denial of a constitutional property right. More so when such failure is intentional and motivated by race discrimination. *See U.S. 42§ 1981.*

Hewitt v Helms, 103 S.Ct. 864, (1983).

Cane v Lane, 864 Fed. 2nd. 1139, (1987).

Kentucky Dept of Corrections v Thompson, 109 S.Ct. 1910 (1989).

Nelson v Krusen, 678 S.W.2d 918 (Texas 1984).

On September 5, 1991 Texas Supreme Court refused to hear petitioner's appeal causing damage to petitioner by allowing a lower court's judgement to stand. This judgement imposes a permanent injunction against the free and unrestricted use of his property in addition to court cost and attorneys fees. The Texas Supreme Court in denying the application stated that the

errors complained of were of no significance to the state. Noting "Writ Denied" as set out in Texas Rules of Appellant Procedure #133(A) hereinafter referred to as T.R.A.P. The rule is (1) unconstitutional; (2) inapplicable to cases where a hearing is mandatory under Texas Government Code 22.001 A (1-5); (3) voidable because it exceeds the Supreme Court's grant of authority under Texas Government Code Section 22.004 (A). "The Supreme Court has full rule-making power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge or modify the substantive rights of a litigant." Clearly the denial to hear petitioner's application for writ of error is a denial of a substantive right protected under the fifth and fourteenth Amendments of the U. S. Constitution. *Evitts v Lucey*, 105 S.Ct. 830, (1985); *Logan v Zimmerman Brush Co.*,

102 S.Ct. 1148 (1982).

The Texas Supreme Court failed to recognize that the application was brought under its mandatory jurisdiction and the complaints reflected conflict and different application and holding between two courts of appeal and the Texas Supreme Court.

II.

Petitioner would show that Rule 133 (A) T.R.A.P. is unconstitutional because it establishes an undefined prerequisite to an appeal and arbitrarily sets up the grant of an appeal to the selection of the Texas Supreme Court. No place in the rule or statute is there a definition of what is an "error of such importance to the jurisdiction of the state as to require correction." The rule also lacks any definition of the statement "no error of law which requires reversal." As a result the rule lacks sufficient guidelines to prevent

arbitrary and discriminatory application. The rule is so vague that no prudent individual can identify the elements of equality in it or with any certainty conclude that he is, or will be entitled to an appeal. It is indicative that every appeal denied or granted may have a different criterion and be exercised at the will or whim of the Texas Supreme Court. This is contrary to the due process privilege guaranteed under our constitution.

In *City of Mesquite v Aladdin Castle, Inc.*, 559 S.W.2nd 92 ref. n.r.e. (Tex. Civ. App. 1977), it was concluded that a law failed to meet standards of due process if it was so vague and standardless as to leave a governing body free to decide without any legally fixed guidelines what is considered in each particular case. The rule bears all the characteristics of an unconstitutional statute or rule. It, (a)

impermissibly burdens petitioner's rights to the degree of denial; (b) it similarly affects the right of third parties; (c) it fails to provide adequate notice of what factors would be considered in the grant of an appeal; and, (d) it fails to state any guidelines to prevent discriminatory enforcement.

Random selection is a blatant disregard for the equal protection amendment and is an injustice to petitioner. This court disapproved of the random stops made by Delaware Highway Police Officers in *Delaware v Prouse*, 99 S.Ct. 1391 (1979). And made the observation that such random stops involved the..."kind or standardless and unconstrained discretion which is the evil the court has discerned..." A parallel may be drawn here from the manner in which the Texas Supreme Courts grants appeal. When an appeal is a statutory right, every case

presented to the Texas Supreme Court should be heard to preserve the equal protection privilege protected by the Constitution. In *Quinn v Millsap* 109 S.Ct., 2324 (1980) this court held that a state law requiring land ownership as a prerequisite to serving on a government board was unconstitutional. In this case T.R.A.P. #133(A) requires that a litigant's case should first satisfy the interest of the state before he is granted a hearing on the merits of the appeal. And to compound this issue, he is not apprised of what would satisfy the state's interest.

Federal due process forbids a state from arbitrarily excluding certain parties from exercising a right of appeal and requires that once the state has created that right it must offer each defendant fair opportunity to adjudication on the merits of his appeal. *Texaco v Pennzoil*, 106 S.Ct. 3270; 107 S.Ct. 1519; 784 Fed.

2nd 1133.

The State of Texas in this case has with one hand created an entitlement to an appeal and with the other has arbitrarily and irrationally withheld it from a particular class of litigants, those whose cases are considered of no interest to the state. See *Griffin v Illinois*, 76 S.Ct. 585. It follows that improprieties and discrimination in the administration of the Texas Rules of Civil Procedures is of no interest to the Texas Supreme Court, or that the lower court violated a due process privilege by imposing sanctions without authority; neither so of the denial of a statutory right of access to books and records of a non-profit corporation granted by this State or that rules of precedents apply unequally to parties representing themselves as to those represented by attorneys. Also that State and Federal

constitutions prohibits discrimination on the basis of race or color; that no person shall be deprived of a substantive right nor shall this State make or enforce any law which shall abridge the privileges and immunities of its citizens or deny them equal protection under law. And that judges of this State are bound by the Supreme Law of the Land, as set out in Article 6, clause 2 of the U.S. Constitution.

III.

In 1917 Justice Hawkins, a sitting judge of the Texas Supreme Court vehemently opposed this rule when it was enacted, he did so on the same constitutional grounds as are presented here by petitioner. See *In Re Subdivision 6 of Supreme Court, Jurisdiction Act of 1917,* 201 S.W. 390 at page 395. Justice Hawkins wrote in part..."let this be clearly understood, the one thing upon which I do insist is that

the appellate jurisdiction of this court shall be definitely prescribed by the legislature and not by this court and not by a committee of judges until our state constitution shall have been amended. To vest in this court the unprecedented power to exercise such appellate jurisdiction." Justice Hawkins here challenged the action of the Texas Supreme Court to formulate and implement such a rule without Constitutional authority. He also states..."the now existing status presents great possibilities for wrong and for deprivation and denial of substantive civil and property rights and the only protection against such possibilities lies in such measure of integrity by the men who from time to time may constitute this court. I respectfully voice my unqualified discontent and record here my solemn protest." Such testimony in support of petitioner's claims in this case

is without question. Justice Hawkins had the foresight to see the potential for abuse and discrimination in the application of an unconstitutional rule and the fortitude to state his disapproval, also the integrity to acknowledge that such constitutional right should not be left to his colleagues or predecessors who may be of uncertain integrity. The rule was repealed in 1927.

Petitioner would show that the rule serves no rational purpose at all. The State of Texas is a unit of its citizens and except the citizens benefit from this rule, it serves no purpose of state interest. But simply accrues maligned authority to the Texas Supreme Court. It cannot be expected to create any benefit when this rule was repealed in 1927 for its failure to promote any measure of good and was considered unconstitutional then, and it

still is today. See *Act of March 25, 1927, Ch. 144, 1927 General and Special Law 214-216*. Because Rule #133(A) T.R.A.P. exceeds the rule-making authority of Section 22.004, Title 2 of Texas Government Code in that it abridges the substantive right of a litigant, it should be ruled void and invalid. And by its enforcement places it in conflict with U. S. Constitution guaranteeing due process and equal protection. Additionally, the rule is not applicable when application for writ of error is made under the mandatory provision of the court's jurisdiction.

Petitioner is entitled to a hearing when all the mandatory requirements are satisfied by law. See *Kentucky Dept. of Corrections v Thompson*, 109 S.Ct. 1910 (1989). This case #88-3876 originated in state district court and appealed to the first court of appeals #90-00657CV and

appealed to the Texas Supreme Court #D-1171. Both trial and appeals courts engage in gross departure of law and procedure to deny petitioner due process and the Texas Supreme Court improperly dismissed this case to protect and disguise the improprieties in conduct of the lower courts.

IV.

Questions 5 - 10 indicate some of the substantial right denied petitioner by the trial court. Under Texas law a complaint answered by a special denial requires the complaining party to support his allegations beyond a mere statement and increases his burden to prove the allegation. As defendant in the trial court petitioner answered the association's complaint by verified denial. See 1st Supplemental Transcript, page 1 of the original documents. See also *Nutting v National Home Manufacturing Co*. 639 S.W.2nd (Texas Civil

Appeals 1983). But the court disregarded the requirement of substantial and probative evidence from the association to overcome a verified denial of the complaint. The trial court went on to grant a default judgement which magnifies the improprieties in view of the Texas Supreme Court ruling in *Frymire Engineering Co. Inc. v Graham*, 524 S.W.2d 680 (Texas 1975). In that case the Texas Supreme Court reversed a default judgement against the defendant when the plaintiff failed to prove that defendant installed faulty wiring upon which plaintiff's negligence suit was based. As a matter of practice in this state petitioner has a substantive property right that the association in response to a verified denial of their complaint produce probative evidence in support of the allegation.

V.

Under Texas Non-Profit Corporation Act a substantive property right to review the books and records of an association is granted to all members and the trial court has denied petitioner that right by ruling some documents are not reviewable by petitioner. Such a right is also granted under the bylaws of Boudreaux Civic Association, Inc. See TR-158, TR-315, and TR-317 of the original documents. (TR=Transcript page). See also *Burton vs Cravey*, 759 S.W.2d 160 (Texas Appeals 1988); *Texas Society vs Fort Bend Chapter*, 590 S.W.2d 156, (Texas Civ. App. 1979). This is also a deprivation of a substantial property right by the trial court.

VI.

Texas Discovery Rule provides that a statute of limitation barring an action runs from the date the nature of an injury

is discovered and not from the date the act occurred giving rise to the injury. *Hays v Hall*, 488 S.W.2d 412 (Texas Supreme 1972). The trial court nonetheless granted summary judgement on the premise that petitioner's counterclaims were barred by statute of limitation and could have been raised in 1983 prior to the time the injury was discovered in 1985. And in spite of the fact that the association concealed its records for 6 years until ordered to produce a selected portion in July 1989. Additionally the trial court granted summary judgement (TR 372) when there existed genuine issues of material fact regarding petitioner's counterclaims contrary to T.R.C.P. 166(c). Because the discovery rule and the summary judgement rule prescribes a given conduct by the trial court it creates a substantive property right when the mandated conditions are met. Any other

action by the court constitutes a deprivation of a substantive right. In this case it is one of equal treatment under Rules of Civil Procedure and customary practice. Neither res judicata, collateral estoppel or statute of limitation is a bar to petitioner's counterclaim when raised under Texas Discovery Rule. See *Weaver v Witt*, 516 S.W.2d 792, 794 (Texas Supreme 1977), *Bayouth v Lion Oil Co*. 671 S.W.2d 867, 868 (Texas Supreme 1984), *Linken Hogen v American Fidelity*, 260 S.W.2d 884, 886 (Texas Supreme 1953).

VII.

Sanctions are intended for the administration of courts but not at the violation of due process. The trial court imposed sanctions without a hearing and before petitioner had committed any sanctionable act. The Association's motion (TR-45) shows that a proper request was never

served. The record shows that a mechanical inspection was never ordered; and that petitioner has a statutory right to examine the books and records of the Association. The imposition of a sanction in this case presents a very different appearance and treatment from other cases. *Ray v Beene* 721 S.W.2d 876 page 880 (4) (Tex.Civ.App. 1986) 1st District. The 61st District Court simply abandoned all guidelines and precedent to deprive petitioner due process privileges. The 80th District Court made no attempt to review the proceeding in the previous court and continued what is the customary treatment against pro-se and black minority litigants. By contrast see also *McRae v. Guinn Flying Services 778* S.W.2d.189 at 191 Civ.App. Houston-1989.

T.R.C.P. #215(2)(6) provides a substantive right to be free of any sanction unless for failure to comply with a proper request as defined by rule 167(1)(c) re-

quiring the requesting party to specify a time, place and manner for discovery which the Association failed to do. Thus leaving petitioner with no obligation to respond. And also free of sanctions until a failure to comply with a court order to provide or permit discovery has occurred. The trial court's power to impose sanctions is limited by the requirement that such order be "Just" and specifically related to the harm done. No measure or test can justify the sanctions against petitioner.

VIII.

The trial court based its sanction in part on statements that petitioner filed frivolous motions and responses. This is flatly not true; furthermore motions and responses are the vehicles by which issues are presented to the court. See T.R.C.P. #21. Additionally, Rule #13 mandates the presumption that motions and responses

SHALL be considered by the courts to be filed in good faith and that sanctions be imposed only for good cause. No cause exists for the sanction imposed against petitioner. To further support this, the court has not included the particulars in the sanction order that would have justified the sanction. Evidence to conclude the allegations are unwarranted and arbitrary, calculated to further deny petitioner a substantive right to a fair disposition of this case; a denial of due process. The award of sanctions is not supported by the records.

STAGE OF THE PROCEEDINGS

The decision of the Texas Supreme court is final and no other proceeding is pending.

METHOD & MANNER OF RAISING

FEDERAL QUESTION

Petitioner raised the question of constitutional denial in his motion for rehearing to the Texas Supreme Court which was overruled. Apart from the fact that the application outlined the improprieties of the lower court which warranted a hearing, the Texas Supreme denied to hear the case when it had a mandatory obligation to do so, thus inflicting a further denial of a constitutional right to an appeal. This action left in place an injunction by the lower court denying petitioner a substantive property right to the free and unjudicial use of his property. It further denies a substantive right of access to the books and records of the Association as prescribed under Texas Non-Profit Corporation Act, all of which are constitutionally protected rights under the U.S.Constitu-

tional amendments five and fourteen. The Texas Supreme Court passed on the constitutional question of petitioner's rights. It is sufficient for this court's jurisdiction that a federal claim was made and not accepted, *New York ex rel, Bryant v Zimmerman* 49 S.Ct. 61,62, also *Illinois v Gates*, 103 S.Ct. 2317, 2321. This court may also reverse a state court's decision on its own findings that such violated a constitutional right. See *Vachon v State of New Hampshire*, 94 S.Ct. 665 (1974). The Texas Supreme Court had every obligation to consider the motion for a rehearing when it raised federal questions.

A challenge may only be raised when petitioner has a standing to do so by virtue of a decision adverse to petitioner. Thus a constitutional challenge to the rule could only be initiated subsequent to the Texas Supreme Court's application of the

rule giving rise to an adverse decision. The motion for rehearing presented the most timely and appropriate opportunity to raise federal questions.

* * * *

A DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The issues raised by this petition reaches far beyond the immediate injustice imposed against petitioner. It highlights the inequity in the administration of this State's judicial system and the burden placed upon selected groups to entertain and secure their constitutional rights. The issues are in no way isolated or peculiar, but affects a large group of citizens and should be addressed by this Court.

The U. S. Constitution Article 6, Clause 2 provides for uniform and equitable

administration among states by holding that... "judges in every state shall be bound thereby." Where it is demonstrated, as in this case, that state courts and judges flagrantly disregard and abuse their authority to the disadvantage of a selected group of citizens, the supervisicn of the U. S. Supreme Court is warranted.

The State of Texas through the Supreme Court has made and enforced Rule 133(a) of Texas Rules of Appellate Procedure; and Texas Government Code Section 22.001 (A) (6) which abridges a statutory right to an appeal. The rule was abolished in 1927 by the State because it was unconstitutional and was reenacted in 1984 in the original form. The intervention of this Court will finally decide and determine whether this rule is unconstitutional, and should be removed or modified to conform to this Court's holding that a statutory right to

an appeal may not be arbitrarily withheld from any class of litigants. For this reason the petition should be granted.

On other issues, the court's conduct demonstrates consistent denial of due process and denial of equal treatment under statutory provision of Texas law. Such conduct has departed so far from the accepted and usual treatment as to create a deliberate erosion of petitioner's constitutional rights in four state courts. Indicative of the pervasive racial discrimination exercised and tolerated in state courts, when such is prohibited by both state and federal constitutions. The ruling of the lower courts has barred petitioner access to books and records necessary to pursue his suit. It has infringed upon the free hold right to his property and unjustly imposed a financial obligation without the commission of any act to justify them.

In short, the Texas Supreme Court has denied petitioner a constitutional right to appeal and will continue to do so in the future without intervention by this Court.

Additionally the lower court decision also infringed upon the constitutional rights of petitioner and without supervision from this Court will continue this practice against others similarly situated. This is a proper case for consideration under 42 U.S. § 1983 for which such relief and redress may be obtained.

It is clear from any point of view that the state court's acting under color of law has deprived petitioner constitutionally protected right and that the system is set up to perpetuate selective treatment and racial discrimination all the way to the Texas Supreme Court level. It is safe to conclude that the action of the judges in the courts below were intentional

and malicious and they were aware of the nature and consequences of their action. The number of improprieties attest to a conscious effort and establish a pattern denying petitioner due process and equal treatment and protection as provided by the Constitution.

U.S. Constitutional Amendment V & XIV, and U.S. 42§1981 prohibits such conduct. While U.S. 42§1983 was intended to provide relief and redress to parties deprived of a protected constitutional right. This Court has not yet stated whether injunctive relief may be obtained against a state defendant for deprivation of federal constitutional rights. This case provides the facts and circumstances to make such a determination. For this reason also, the writ should be granted.

WHEREFORE, petitioner prays that this Court do grant this writ and upon a full

review, declare that paragraph #6 of Texas Government Code, Section 22.001(A) is unconstitutional; likewise Texas Rules of Appellate Procedure Rule #133(A) because these rules abridge the substantive right of petitioner and all other litigants similarly situated. And that the contain no safeguard against selective and discriminatory enforcement or due process guarantee. Petitioner prays that this Court will reverse the judgement of the Texas Supreme Court and issue an order directing that court to hear petitioner's appeal.

Petitioner prays that in the alternative this Court upon its own finding that an injustice as to matter of law has been committed against petitioner, reverse the judgement of the lower court on the basis that no evidence exists to support the judgement.

Petitioner prays specifically that this Court will reverse the judgement of the trial court granting a permanent injunction and awarding attorneys fees and cost and render same be dissolved and denied. And that all total cost be charged against the respondent, Boudreaux Civic Association, Inc.

Petitioner prays that the Partial Summary Judgement entered against him on his counter claims be REVERSED AND REMANDED for trial on its merits.

Petitioner prays that this court issues an order mandating the trial court to vacate its protective order and release all documents for inspection by Defendant Leary Cox.

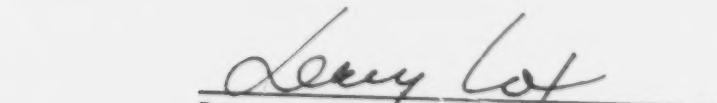
Petitioner prays that this Court will issue an order directing Boudreaux Civic Association to produce unconditionally its books and records for inspection by Leary

Cox as set out in Article XV of the Association's bylaws. Or in the alternative direct the trial court to so issue an order.

Petitioner prays that this Court will issue an order directing Boudreaux Civic Association to refund $200.00 to Defendant Leary Cox paid to them in compliance with an improper court order. Or in the alternative direct the trial court to so issue an order. And that same be paid within fifteen (15) days of signing of such order.

Petitioner prays that he be granted all of any further relief general and specific, at law or in equity to which he may be entitled.

Respectfully submitted,



Leary Cox, Pro se
26106 LaFouche
Tomball, Texas 77375
713/351-7865

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APPENDIX "A"

No. 88-36371

BOUDREAUX ESTATES ASSOCIATION, INC.	*	IN THE DISTRICT COURT OF
vs.	*	HARRIS COUNTY, TEXAS
LEARY COX	*	61ST JUDICIAL DISTRICT

ORDER AUTHORIZING INSPECTION OF PROPERTY AND AWARDING SANCTIONS

On this day came on to be considered Plaintiff Boudreaux Estate Civic Association, Inc.'s Motion for Sanctions because of Defendant Leary Cox's failure to allow inspection of property. After consideration by the Court, it appears that said motion should be granted. It is, therefore,

ORDERED, that Defendant Leary Cox allow Plaintiff, its attorneys, and agents to inspect the stored vehicles located at his residence at 26106 LaFouche, Tomball, Texas 77375, on Friday, the 20th day of

January 1989, at 3:00 o'clock p.m. It is further,

ORDERED, that Plaintiff recover its reasonable attorney's fees incurred in prosecuting this Motion for Sanctions, which the Court finds to be in the sum of $200.00. It is further,

ORDERED, that said award of attorney's fees be paid to Plaintiff within ten (10) days of this date of this Order.

SIGNED THIS 16 day of Jan., 1989.

/s/Shearn Smith
JUDGE PRESIDING

* * * *

NO. 88-36371

BOUDREAUX ESTATES CIVIC ASSOCIATION, INC.	*	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
V.	*	61ST JUDICIAL
LEARY COX	*	DISTRICT

SECOND ORDER OF SANCTIONS

On this day came on to be considered

Plaintiff, BOUDREAUX ESTATES CIVIC ASSOCIATION, INC'S Second Motion for Sanctions against Defendant, Leary Cox, for his failure to allow inspection of property and to comply with this Court's order of January 16, 1989. After consideration by the Court, it appears that Plaintiff's Second Motion for Sanctions should be granted. IT IS, THEREFORE,

ORDERED: that plaintiff be allowed to inspect the vehicles made the subject of Plaintiff's second motion for sanctions with a mechanic March 31, 1989, at 3 p.m.

SIGNED this 27 day of Feb., 1989.

/s/Shearn Smith
JUDGE PRESIDING

APPROVED AND ENTRY REQUESTED:
/s/Stephen P. Dillon
Houston, TX 77074

* * * *

No. 88-36371

BOUDREAUX CIVIC ASSOCIATION, INC.	*	IN THE DISTRICT
	*	OF HARRIS COUNTY,
	*	TEXAS
VS.	*	
LEARY COX	*	61ST JUDICIAL
	*	DISTRICT

ORDER TO COMPEL THE PRODUCTION OF DOCUMENTS

ON THIS DAY came to be considered Counter-plaintiff's motion to compel the production of documents and after consideration of the arguments presented the court is of the opinion that this motion should be granted in all respects.

It is Hereby ORDERED ADJUDGED AND DECREED THAT Boudreaux Civic Association, Inc. the counter-defendant do produce the documents as requested by counter-plaintiff within 20 days of the signing of this order, #1. to file response with the Court "in camera."

It is FURTHER ORDERED, ADJUDGED AND DECREED

that the counter-defendant, Boudreaux Civic Association, Inc. make payment of $250.00 the amount of reasonable cost and expense incurred in bringing this motion, within (10) days of the signing of this order.

It is further ORDERED, #2. that Respondent privileged to produced in Boudreaux Estates Subdivision for inspection within 20 days.

Signed this 27 day of July, 1989.

/s/ Shearn Smith
Judge Presiding

* * * *

No. 88-36371

BOUDREAUX ESTATES CIVIC ASSOCIATION, INC.	*	IN THE DISTRICT COURT OF
	*	HARRIS COUNTY
vs.	*	TEXAS
LEARY COX	*	61ST JUDICIAL DISTRICT

ORDER DENYING DISCOVERY OF RECORDS

The enclosed material has been examined in camera and held privileged and not discoverable.

SIGNED this 30 day of August, 1989.

/s/ Shearn Smith
Judge Presiding

* * * *

NO. 88-36371

BOUDREAUX ESTATES ASSOCIATION, INC.	*	IN THE DISTRICT COURT OF
vs.	*	HARRIS COUNTY TEXAS
LEARY COX	*	61ST JUDICIAL DISTRICT

ORDER OF RECUSAL

On this day came on to considered the Motion for Recusal of the Honorable Shearn Smith, Judge, 61st Judicial District Court of Harris County, Texas, filed by Plaintiff Boudreaux Estates Civic Association, Inc., in the above entitled and numbered cause. After consideration by the Court, it appears that because of the counter-claim filed by Defendant Leary Cox in the above entitled and numbered cause, and the fact that Mr. Don Sheldon Smith, attorney at

law, the son of the Honorable Shearn Smith, may be called as a factual witness on said counterclaim, the Honorable Shearn Smith should recuse himself from any further consideration of this case. It is, therefore,

ORDERED that the Honorable Shearn Smith be and hereby is recused from any further consideration of this matter and that this case shall be assigned to another judge by the Presiding Judge of the Second Administrative Judicial District in accordance with Rule 18a (c) of the Texas Rules of Civil Procedure.

Signed this 8 day of Sept., 1989.

/s/ Shearn Smith
Judge Presiding

APPROVED AND ENTRY REQUESTED:
SCHIMMEL & ASSOCIATES, P.C.
/s/ Stephen P. Dillon
STEPHEN P. DILLON
Houston, Texas 77074

- - - -

Letterhead of: PETER S. SOLITO
Judge, 164th District Court
Harris County Courthouse
September 29, 1989

Hon. Ray Hardy
District Clerk
301 Fannin
Houston, Texas 77002

Re: Cause No. 88-36371; Boudreaux Estates Civic Association, Inc. v. Leary Cox: in the 61st Judicial District Court of Harris County, Texas

Dear Mr. Hardy:

Judge Shearn Smith has recused himself in the above cause. I direct that you refile the case by random filing and notify all parties concerned.

Very truly yours,

/s/ Peter S. Solito
Administrative Judge
Civil Trial Division

* * * *

BY LAWS
Boudreaux Civic Association, Inc.
(in part)

ARTICLE XV

BOOKS AND PAPERS

The books, records and papers of the Corporation shall at all times, during reasonable business hours, be subject to inspection by any member.

Ch. 9 NON-PROFIT CORPORATION ACT

Art. 1396-2.23 (B)

B. All books and records of a corporation may be inspected by any member, or his agent or attorney, for any proper purpose at any reasonable time.

Acts 1959, 56th Leg., p. 286, ch. 162, art. 2.23.

* * * *

OPINION IN THE COURT OF APPEALS FOR THE

FIRST DISTRICT OF TEXAS

NO. 01-89-01209-CV

THE HONORABLE WILLIAM POWELL, JUDGE OF THE 80TH DISTRICT COURT OF HARRIS COUNTY, TEXAS, Respondent

Original Proceeding on Motion for Leave to File Petition for Writ of Mandamus

Relator, Leary Cox, asks that we

compel the respondent, the Honorable William Powell, to order the production of documents in the possession of the real party in interest, the Boudreaux Civic Association, Inc.

This litigation originated in the 61st Judicial District Court of Harris County. Cox alleges that Boudreaux Civic Association sued him and that he counter claimed, alleging "selective and discriminatory enforcement of deed restrictions." Cox sought the production of the civic association's books and records. He alleges that, on October 30, 1989, the Honorable Shearn Smith determined "some of these documents" to be privileged. He attaches an order dated August 30, 1989, that reflects such a ruling.

According to the relator's mandamus petition, Judge Smith subsequently recused himself and the underlying litigation was

transferred to the 80th District Court. Cox alleges that, on November 17, 1989, Judge Powell denied Cox's motion to review documents ruled privileged by Judge Smith. The mandamus record does not contain a copy of Judge Powell's alleged order of November 17, 1989 nor of relator's motion.

The relator has not carried his heavy burden of demonstrating the necessity for mandamus relief. The exhibits he has attached to his mandamus petition do not include a certified or sworn copy of the order complained of, nor of other relevant exhibits that might demonstrate the necessity for the writ. *See* TEX.R.App.P.121(a)(2)(C). We note that the mandamus record contains orders signed by Judge Smith, but includes no documentation showing that Judge Powell denied relator's motion. A writ of mandamus will not issue against Judge Powell, who now has jurisdiction over

the case, in the absence of a refusal by him to grant the relief relator seeks. *State v. Olsen,* 163 Tex.449,360 S.W.2d 402,403 (1962).

Furthermore, the mandamus record does not contain any of the discovery papers allegedly filed in the trial court. Without those documents, we cannot conclude that the facts and circumstances dictated a ruling contrary to the one of which relator complains. *See Johnson v. Fourth Court of Appeals,* 700 S.W.2d 916, 197-18 (Tex.1985) (in order to show abuse of discretion justifying mandamus relief, facts and circumstances must compel single decision rejected by trial court).

Accordingly, the motion for leave to file a petition for writ of mandamus is OVERRULED.

PER CURIAM

Panel consists of Chief Justice Evans and

Justices Duggan and Mirabal.

Do not publish. Tex.R.App.P.90.

Judgement rendered and opinion delivered Feb. 1, 1990.

True Copy Attest: /s/Kathryn Cox, Clerk

* * * *

NO. 88-36371

BOUDREAUX CIVIC ASSOCIATION, INC.	*	IN THE DISTRICT COURT
V.	*	OF HARRIS COUNTY
	*	TEXAS
	*	
LEARY COX	*	80TH JUDICIAL DISTRICT

ORDER TO INCLUDE PROTECTED DOCUMENTS WITH TRANSCRIPT AS PART OF RECORDS

TO THE CLERK OF THE COURT:

YOU ARE HEREBY ORDERED to include all documents ruled and held privileged and non-discoverable under court order dated August 30, 1989, by the 61st Court, in the transcript as requested by Defendant Leary Cox, and that such documents be part of the record and transported to the First Court

of Appeals.

Signed this 17 day of August, 1990

/s/William R. Powell
Judge Presiding

* * * *

NO. 88-36371

BOUDREAUX CIVIC ASSOCIATION, INC.	* IN THE DISTRICT * COURT OF
VS.	* HARRIS COUNTY, * TEXAS
LEARY COX	* 80TH JUDICIAL * DISTRICT

ORDER FOR PARTIAL SUMMARY JUDGEMENT

On this day came on to be considered Counter Defendant Boudreaux Civic Association, Inc., and Third Party Defendants Brenda Tolleson, Dianne Trimm, Leary Trimm, Susan Hughes, Pat Prejean, Dwayne Prejean and John Walton's Motion for Partial Summary Judgement as to the Counterclaims and Third Party Claims of Counter Plaintiff LEARY COX. After review of the Motion, it appears that Paragraphs I, II, III, IV, and

V of "Counter Plaintiff Original Counterclaim" arise out of a prior judgment between Leary Cox and the Boudreaux Civic Association, Inc., under Cause No. 83-63069, styled Boudreaux Civic Association, Inc. vs. Leary W. Cox; in the 152nd Judicial District Court of Harris County, Texas. The Court finds that the Counterclaims and Third Party Claims set forth in paragraphs I, II, III, IV, and V of "Counter Plaintiff Original Counterclaim" filed herein by Defendant Leary W. Cox are barred by the doctrines of res judicata, collateral estoppel, and the applicable statute of limitations. It is, therefore

ORDERED, ADJUDGED and DECREED that Counter Plaintiff Leary Cox take nothing on any claims made the subject of his Original Counterclaim and Third Party Claims against Counter Defendant and Third Party Defendants that are based on the judgment previ-

ously rendered under Cause No. 83-63069; a case styled Boudreaux Civic Association, Inc. vs. Leary W. Cox; in the 152nd Judicial District Court of Harris County, Texas. It is further,

ORDERED, ADJUDGED and DECREED that Counter Plaintiff Leary Cox take nothing on his Counterclaim and Third Party Claims made the subject of paragraphs I, II, III, IV,and V of "Counter Plaintiff Original Counterclaim." It is further,

ORDERED, ADJUDGED and DECREED that Counter Defendant and Third Party Defendants recover costs of Court against Counter Plaintiff Leary W. Cox, for which let execution issue.

SIGNED this 17 day of Nov., 1989.

/s/ William R. Powell
JUDGE PRESIDING

APPROVED AND ENTRY REQUESTED:
/s/ Stephen P. Dillon
STEPHEN P. DILLON

* * * *

NO. 88-36371

BOUDREAUX CIVIC ASSOCIATION, INC.	*	IN THE DISTRICT COURT OF
V.	*	HARRIS COUNTY TEXAS
LEARY COX	*	80TH JUDICIAL DISTRICT

THIRD ORDER FOR SANCTIONS

On this day came on to be considered Plaintiff and Counter Defendant BOUDREAUX CIVIC ASSOCIATION, INC.'S Third Motion for Sanctions against Defendant, Counter Plaintiff, and Third Party Plaintiff, Leary Cox, for his failure to allow inspection of vehicles, for his pattern of harassment with respect to inspection of the books and records of the Association, and for his failure to submit to deposition. After consideration of Plaintiff and Counter Defendant's Third Motion for Sanctions, and the affidavits filed in support thereof, it

appears that same should be granted. It is, therefore,

ORDERED that Defendant, Counter Plaintiff and Third Party Plaintiff Leary Cox appear and submit to deposition at the offices of Schimmel & Associates, P.C., 8300 Bissonnet, Suite 170, Houston, Texas 77074, on Friday, January 11, 1990, at 2:00 p.m. It is further,

ORDERED that the pleadings of Defendant, Counter Plaintiff and Third Party Plaintiff Leary Cox be and hereby are stricken. It is further,

ORDERED that Plaintiff and Counter Defendant Boudreaux Civic Association, Inc., as well as all Third Party Defendants herein, are hereby given judgment by default against Defendant, Counter Plaintiff and Third Party Plaintiff Leary Cox as to all claims, matters, and things in controversy between the parties, and that the

only issues that need be tried will be on Plaintiff, Counter Defendant, and Third Party Defendant's claim for damages and attorney's fees herein. It is, further,

ORDERED that Plaintiff and Counter Defendant Boudreaux Civic Association, Inc. recover its reasonable attorney's fees and costs incurred in prosecuting its Second Motion for Sanctions, Third Motion for Sanctions, and in responding to the harassing discovery tactics of Defendant, Counter Plaintiff and Third Party Plaintiff Leary Cox, which the Court finds to be $5,500.00. It is further,

ORDERED that the award of attorney's fees herein be paid to Plaintiff and Counter Defendant within ten (10) days of the date of this Order.

SIGNED this 5 day of January, 1990.

/s/ William R. Powell
JUDGE PRESIDING

APPROVED AND ENTRY REQUESTED:
SCHIMMEL & ASSOCIATES, P.C.
/s/Stephen P. Dillon
STEPHEN P. DILLON

* * * *

No. 88-36371

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
80TH JUDICIAL DISTRICT

BOUDREAUX ESTATES CIVIC
ASSOCIATION, INC.

VS.

LEARY COX

ORDER
ON DEFENDANT'S MOTION TO RECUSE
HON. WILLIAM R. POWELL

BE IT REMEMBERED that on this the 26th day of February, 1990, the undersigned judge having been duly assigned to hear the Defendant Leary Cox' Motion to Recuse the Hon. William R. Powell pursuant to TRCP 18a, the parties appear and announce ready. After evidence and argument of counsel, the court concludes such Motion to Recuse should be in all things DENIED. It is

accordingly:

ORDERED that Defendant Leary Cox' Motion to Recuse the Hon. William R. Powell be and the same is hereby in all things: DENIED. Cause shall proceed to trial on the docket for February 19, through March 2, 1990.

Signed February 26, 1990.

/s/ P. K. Reiter
P. K. Reiter, Judge Presiding

* * * *

NO. 88-36371

BOUDREAUX CIVIC ASSOCIATION, INC.	*	IN THE DISTRICT COURT OF
VS.	*	HARRIS COUNTY
	*	TEXAS
LEARY COX	*	80TH JUDICIAL DISTRICT

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The above captioned cause came on for trial before the Court without a jury on February 27, 1990. Plaintiff Boudreaux

Civic Association, Inc. was present at trial through its designated representative, MS. BRENDA TOLLESON, and through its attorney of record, Mr. Stephen P. Dillon, of Schimmel & Associates, P.C. Defendant Leary Cox appeared at trial and represented himself without an attorney. After considering the pleadings and the evidence, and in response to a request from Defendant Leary Cox, the Court hereby makes its findings of fact and conclusions of law.

FINDINGS OF FACT

1. Leary Cox, in his capacity as Defendant, engaged in discovery abuse by failing to allow Plaintiff to conduct a mechanical inspection of two vehicles made the subject of this suit, specifically, one red Ford LTD with expired Ontario license plate number NDS.679 (hereinafter referred to as the Ford), and one blue Fiat, Bertone

X19 with an expired Texas license plate number 224.EKS (hereinafter referred to as the Fiat).

2. Leary Cox, in his capacity as Defendant, violated two (2) court orders commanding him to allow Plaintiff and its representatives to conduct a mechanical inspection of the Ford and the Fiat.

3. Leary Cox, in his capacity as Counter Plaintiff, engaged in discovery abuse in inspecting and attempting to inspect the books and records of Plaintiff and Counter Defendant.

4. Leary Cox, in his capacity as Defendant, Counter Plaintiff, and Third Party Plaintiff, engaged in discovery abuse by filing frivolous discovery motions and frivolous responses to Plaintiff's discovery motions.

5. Leary Cox, in his capacity as Defen-

dant, Counter Plaintiff, and Third Party Plaintiff, engaged in discovery abuse by failing to attend and to submit to a duly noticed deposition.

6. As a result of the discovery abuse outlined in numbers 1 through 5 above, the Court granted, in part, Plaintiff's Third Motion for Sanctions. The Court's January 5, 1990 Third Order of Sanctions, among other things, struck the pleadings of Defendant, Counter Plaintiff, and Third Party Plaintiff Leary Cox and entered a default judgment against him. The Court's January 5, 1990 Third Order of Sanctions further provided that "the only issues that need to be tried will be on Plaintiff, Counter Defendant's and Third Party Defendant's claims for damages and attorney's fees... ."

7. At trial, Plaintiff did not prove that it was entitled to damages under Section 202.004 (c) of the Texas Property Code.

8. At trial, the evidence showed that Defendant Leary Cox voluntarily abated the violation of the deed restrictions of the Boudreaux Estates subdivision regarding the parking of inoperable vehicles after suit was filed against him.

9. At trial, the evidence showed that Defendant Leary Cox would probably violate the deed restrictions of the Boudreaux Estates subdivision regarding the parking of inoperable vehicles in the future unless enjoined from doing so in the future.

10. At trial, Plaintiff proved reasonable attorney's fees in the following amounts:

(a) $22,000.00 for services rendered through trial;

(b) $3,500.00 in the event of an appeal to the Texas Court of Appeals;

(c) $2,000.00 in the event of an application for writ of error to the Texas Supreme Court;

(d) $1,500.00 in the event an application for writ of error is granted and an appeal is taken to the Texas Supreme Court; and

(e) $25,000.00 in the event of an appeal or petition for writ of certiorari to the United States Supreme Court.

CONCLUSIONS OF LAW

1. The Court's June 5, 1990, Third Order of Sanctions was authorized by Rule 215 of the Texas Rules of Civil Procedure.

2. Pursuant to Rule 215 of the Texas Rules of Civil Procedure, the Court's January 5, 1990, Third Order of Sanctions, and the evidence at trial, Plaintiff, Boudreaux Civic Association, Inc. is entitled to a permanent injunction enjoining and prohibiting Defendant Leary Cox, his agents, servants, employees, or those acting in concert with him, from parking or keeping inoperable cars at his residence located at 26106 LaFouche, Tomball, Texas, and more particularly described as Lots 70, 71, and 72, Section 3, of Boudreaux Estates, a subdivision in Harris County, Texas as recorded under Clerk's file number F497155, Film Code number 188-12-0688, et seq., of the real property records of Harris County, Texas.

3. Plaintiff Boudreaux Civic Associa-

tion, Inc. is not entitled to recover civil damages from Defendant Leary Cox.

4. Pursuant to Rule 215 of the Texas Rules of Civil Procedure, Section 5.006 of the Texas Property Code, and the deed restrictions for the Boudreaux Estates subdivision, Plaintiff Boudreaux Civic Association, Inc. is entitled to recover its reasonable attorney's fees from Defendant Leary Cox in the amounts set forth under Findings of Fact number 10 above.

5. Plaintiff Boudreaux Civic Association, Inc. is entitled to recover its cost of court from Defendant Leary Cox.

6. Plaintiff Boudreaux Civic Association, Inc. is entitled to recover post judgement interest on the Court's March 20, 1990 judgment until

all sums awarded under said judgment are fully and finally paid.

/s/William R. Powell 5/2/90
JUDGE PRESIDING

* * * *

No. 88-36371

BOUDREAUX ESTATES CIVIC ASSOCIATION, INC.	)	IN THE DISTRICT COURT
VS.	)	HARRIS COUNTY TEXAS
LEARY COX	)	80TH JUDICIAL DISTRICT

STATEMENT OF FACTS

BE IT REMEMBERED that upon this the 27th day of February, 1990, the above entitled and numbered cause came for trial before the Honorable William R. Powell, Judge of the 80th District Court of Harris County, Texas; and with the plaintiff corporation being represented by counsel, and with the defendant appearing pro se, announced ready for trial; and after all preliminary matters having been disposed

of, the following proceedings were had:

Charles W. Conroy, Jr.
Court Reporter
80th District Court
301 Fannin Street, Room 503
Houston, Texas 77002

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APPEARANCES

Counsel for the plaintiff:

Mr. Stephen P. Dillon
Schimmel & Associates
Houston, Texas 77074

Counsel for the defendant:

Mr. Leary Cox, pro se
26106 LaFouche
Tomball, Texas 77375
Phone (713) 351-7865

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MR. DILLON: Your Honor, I would like to call Brenda Tolleson.

THE COURT: All right. Let the record reflect, first of all, that the file indicates that the jury fee was paid on January 31, 1990, and as such, is untimely under the Rules of Civil Procedure. It will be tried before the Bench.

MR. COX: Your Honor, may I confer with Mr. Dillon for just one minute?

THE COURT: Sure.

MR. DILLON: Mr. Cox has presented me

with a motion to abate, apparently under the grounds that my client conducted an assumed name without registering it. This is the first I have seen of it. It is a surprise to me, but I am ready to go to trial.

THE COURT: Call your first witness.

BRENDA TOLLESON

was called as a witness by the plaintiff, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Dillon:

Q Would you state your name and address for the Court, please?

A My name is Brenda Tolleson. My address is 25910 D'jon Street, Tomball 77375.

Q What is your position with the plaintiff?

A I am president of the Boudreaux Es-

tates Civic Association, also a member of the board of directors.

Q Is the civic association a Texas nonprofit corporation?

A Yes, sir, it is.

Q To your knowledge, is it currently authorized and registered to do business in Texas.

A Yes, it is.

Q How long have you been active in the affairs of the Boudreaux Estates Civic Association?

A I have been involved in the civic association since 1983.

Q How long have you been the president?

A I have been president since April of 1986.

Q Do you know the defendant, Leary Cox, in this case?

A Yes, I do.

Q How long have you known him?

A He is a resident and a property owner in the Boudreaux Estates.

Q What property, the address and legal description, if you will, does he own in Boudreaux Estates?

A 26102 LaFouche. I think it is Section. I am not exactly sure of the street number. It is Section 3, Lot 70, 71 and 72 of the Boudreaux Estates.

Q I believe you already stated that that property is within the Boudreaux Estates Subdivision?

A That is correct.

Q Now, does the Boudreaux Estates Subdivision have deed restrictions?

A Yes, we do.

MR. DILLON: May I approach the witness, Your Honor?

THE COURT: Sure.

Q (By Mr. Dillon) I will show you what

previously has been marked as Plaintiff's Exhibit No 1, and ask you if you can identify that for the Court?

A Yes. These are the deed restrictions for the Boudreaux Estates.

MR. DILLON: I would like to tender these to Mr. Cox and request they be admitted into evidence at this time.

MR. COX: No objection, Your Honor.

THE COURT: It will be admitted.

(At this time Plaintiff's Exhibit No. 1 was admitted into evidence, copy of which is included under separate cover and made a part of this record).

Q (By Mr. Dillon) Why was this lawsuit brought against Mr. Cox?

A The lawsuit was brought against Mr. Cox because he had inoperable cars on his property.

Q Is that a violation of the deed re-

strictions?

A That is a violation of Paragraph 6 of the deed restrictions.

Q When did the Association first notice a problem with inoperable vehicles being parked on Mr. Cox's property?

A The Maintenance Committee reported a violation on October 13, 1989. I signed a letter to Mr. Cox on October 5, 1987. At that time there were 3 vehicles that appeared to be inoperable. One was parked on the side yard with grass growing around it, and the other 2 were in the driveway with the hoods removed. One of the hoods was leaning up against the fence.

When I received the Maintenance Committee report--before I sign a letter, I generally drive by the properties to view the conditions of the properties, myself. And I drove

by and viewed those circumstances myself before I signed the letter that is dated October 5, 1987.

Q Can you describe to the Court the types of vehicles, the license plate numbers, if your remember?

A There is a blue Fiat, X-19, I believe; and a red Ford LTD. The red Ford LTD had an Ontario license plate which I do not remember exactly. The blue Fiat had a license plate that expired in 1984, and an inspection sticker that expired in 1984, although it was registered in Texas.

Q I will hand you some photographs which have been marked as Plaintiff Exhibit No. 2 through 8, and ask if you would review those photographs and identify them.

A One by one or just as a group?

Q As a group, if you can.

A Okay. Yes. These are photographs that were taken on Mr. Cox's property specifically of the vehicles in question: the red Ford LTD and the blue Fiat. They are true and correct representations of the conditions on January 20, 1989.

Q Is that when these photographs were taken?

A That is correct. That is when I took these photographs.

MR. DILLON: At this time, Your Honor, I will tender these to Mr. Cox and offer Plaintiff Exhibits Nos. 2 through 8 into evidence.

THE COURT: They will be admitted.

(At this time Plaintiff's Exhibit Nos. 2 through 8 were admitted into evidence, copies of which are included under separate cover and made a part of this record.)

Q (By Mr. Dillon) Since the filing of this lawsuit, has Mr. Cox taken any steps to try to cure or eliminate the deed restriction violation?

A Yes. Somewhere between January 20, 1989 and March 31, 1989, he moved the blue Fiat into his garage and closed the garage door. It was still there a week or so ago when I walked past his house.

The red Ford LTD is now licensed and inspected by the State of Texas. I noticed that on January 9, 1990 when I hand-delivered documents to his property.

Q Basically, how long was Mr. Cox in violation of the deed restrictions relating to the parking or storage of inoperable vehicles on his property?

A The first report was October 3, 1987. We filed a lawsuit in June of 1988.

There was a Maintenance Committee report on November 11, 1989, which stated that there was a car with expired Ontario plates on the property.

Somewhere between November 11, 1989 and January 9, 1990 Mr. Cox obtained license plates and registration for the red Ford LTD. The blue Fiat is still on his property and stored in the garage.

Q Is the current status of the blue Fiat considered a violation of the restrictions?

A Generally, no, we would not consider it a violation that he chooses to store a car in his garage with the garage door closed.

Q Now, in your position as president of the Boudreaux Estates Civic Association, and during your tenure with the

Boudreaux Estates Civic Association, have you had the opportunity to canvass realtors and other real property professionals regarding property values in your neighborhood?

A Yes, sir, I have. I frequently receive calls from realtors and potential buyers, potential property owners for the subdivision. I do talk to them often, at least once a week on an average. I talk to someone who is either a realtor asking questions about property in the subdivision or a potential property owner.

Q Based on that knowledge and experience, do you feel that the condition of Mr. Cox's property with the inoperable vehicles in and about his property caused harm or had been a detriment to the subdivision?

A Yes, I do.

MR. COX: May I object, Your Honor. This is hearsay.

He just asked for an opinion.

MR. COX: He asked her if she had spoken to some realtor.

THE COURT: That was the question that preceded this one. What is your objection to the question now where he asked for her opinion?

MR. COX: I am sorry, Your Honor.

Q (By Mr. Dillon) How would you characterize the degree of harm?

A It is difficult for me to characterize that. I know that realtors are very concerned about the overall condition of the subdivision as they list properties or show properties in the subdivision.

Potential buyers who come through the subdivision have stopped

at my house or called me and asked for a copy of the deed restrictions, asked questions about specific properties that did not appear to be neatly kept at that moment. And they asked, "What are you doing to solve this problem?"

So I believe that the overall appearance of the subdivision is very important to potential buyers, and even to the realtors who choose to bring their clients into the subdivision to view properties. A property that is not kept or appears junky has an adverse effect on the subdivision. It is difficult for me to quantify the degree, although I do know several people, people who called me back and said, you know, that they had decided not to purchase property in the subdivision because there were

properties that they thought were unkept at that point in time, even though we were working on it.

We try very hard to enforce the deed restrictions when a problem arises. We take action as quickly as possible. There are times when there are properties that don't appear neatly groomed, but we do take action to resolve that problem. I do know that unkept properties have an adverse effect on the market value in the subdivision.

Q Has this litigation with Mr. Cox been expensive?

A Extremely expensive. To date we have spent over $20,000 in legal fees, court costs and other costs associated with this litigation. In fact, we have incurred over $20,000 in costs without the services that have been

rendered in the month of February. We still owe our attorney, Schimmel & Associates, nearly $8,000 of that $20,000.

Q Since this lawsuit was initiated, outside the confines of the litigation, itself, has Mr. Cox engaged in any kind of personal attack on the Association or its members?

A Specifically on the board of directors and the administration, past and present of the civic association, he had made numerous slanderous statements such as the statement, "We are masquerading jackasses; irrational, inept, irresponsible, unscrupulous." That we are stealing money from the property owners for our own design. A number of statements which are very slanderous to the individuals who have spent a great deal of volunteer

time and effort to keep the community as a nice, presentable and livable community.

Q You mentioned the volunteer effort. Are the members of the Association and the board of directors, or those who conduct work on behalf of the Association, paid for their services?

A No. We do pay for some outside services, but the directors and officers of the Association are not paid for their time. And a great deal of time and effort has been spent since June of 1989 in dealing with the litigation and a number of personal attacks and difficult situations have been very frustrating for those volunteers involved with the civic association.

In fact, we have been told by several people that they no longer wish to volunteer because they fear

that they will also be sued at some point in time.

MR. COX: Your Honor, I object to his as hearsay.

THE COURT: Sustained. Strike it.

Q (By Mr. Dillon) As a result of this lawsuit, was the Association forced to take any action to increase its maintenance fees?

A Yes. The board of directors called a special election in December of 1989 to increase maintenance fees from $45 per year to $100 per year.

In 1989 our total maintenance fees charged were about $8,000, so that is a very small budget. We are a very small subdivision with a $45 a year maintenance feel. We have a very limited budget. Because of the cost of this litigation we had to ask the membership to approve an increase in

the maintenance fee. The did, by the way, approve that increase overwhelmingly.

MR. DILLON: That is all I have of this witness, Your Honor.

THE COURT: Mr. Cox?

CROSS EXAMINATION

Questions by Mr. Cox:

Q Mrs. Tolleson, how long have you lived in Boudreaux Estates Subdivision?

A Purchased my property there in July of 1981, and we moved into the house in October of 1981.

THE COURT: Would you pull that mike up further.

A We purchased our property in July of 1981, and moved into the subdivision in October of 1981.

Q (By Mr. Cox) Have you known me, Leary Cox, since the time you moved into

the subdivision?

A No. As a matter of fact, I believe the first time I met you was in June of 1988 when I discussed the condition of your property with you.

Q Did you know of me prior to your meeting?

A Yes, sir, I did.

Q What circumstances led to your knowing of me?

MR. DILLON: Your Honor, I will object to this line of testimony at this time, as I believe Mr. Cox is attempting to go into a prior lawsuit that he attempted to relitigate in this case, in which the Court previously had granted a motion for a partial summary judgment, and instructed a take nothing verdict against Mr. Cox. I think it would be inappropriate to consider it at this time, Your Honor.

THE COURT: What is your relevan-

cy, Mr. Cox?

MR. COX: Your Honor, I am trying to establish when Mrs. Tolleson knew me and of my property.

THE COURT: Why, Mr. Cox?

MR. COX: The damages commenced at a certain point, Your Honor, and she knew of the conditions at that time.

THE COURT: Did it commence and then become a part of the other lawsuit?

MR. COX: No, Your Honor.

THE COURT: I will hear it as it relates to this case alone.

MR. COX: Yes, Your Honor.

THE COURT: Go ahead.

Q (By Mr. Cox) At the time you knew of me, was there a reference to cars on my property; under the conditions which you knew of me, was there any relation to cars on my property?

A I first knew of you because I was on

the board of directors at the time of our previous lawsuit with you, Mr. Cox. And I did know of a reference to cars on your property at that point because that was one of the issues that was brought up in court and, I believe, was in the first agreed judgment in that lawsuit, that you would remove inoperable cars from the property.

Q I don't intend to go into the previous litigation. Were you aware of the conditions of my cars at that time?

A What time?

MR. DILLON: Your Honor, I am going to object, and ask for clarification as to what cars he is referring to. I think the record would reflect that there is more than one set of cars.

THE COURT: I don't know what he is trying to ask, but I will give him every

opportunity. Go right ahead.

MR. COX: I will rephrase my question, Your Honor.

Q (By Mr. Cox) When first did you know of inoperable cars, or when first did you determine that there were cars on my property?

A Are you referring to the current lawsuit, or which particular cars are you talking about?

Q The cars on which you sued pertaining to this lawsuit.

A Okay. I first became aware of inoperable cars on your property on February 3, 1987 when the Maintenance Committee report was submitted, stating that there were inoperable cars on your property.

Q Were there any other inoperable cars in the subdivision at that time?

MR. DILLON: Your Honor, I object

on the grounds of relevancy. I think our inquiry here is limited to damages and attorney's fees. I don't think that if there were or were not other inoperable cars in the subdivision is relevant to this inquiry.

THE COURT: I am afraid so. Didn't I strike your pleadings?

MR. COX: Yes, Your Honor.

THE COURT: I will let you go ahead and make your record on it, anyway, but I won't consider it for any relief.

Q (By Mr. Cox) In your opinion, has the presence of the cars caused any damage to the subdivision?

THE COURT: She didn't answer your previous question about whether or not there were other inoperable cars in the subdivision.

A From time to time there are cars that appear to be inoperable, and those

are reported by the Maintenance Committee. A letter is written, and the problems in all other cases have been resolved. The property owners have taken care of the problem either by removing the cars or properly storing them in the garage so that they are out of sight.

THE COURT: Now, the question before you is, how does this affect the damage to the subdivision?

A I believe that any unkept property has some effect on the property values in the subdivision.

Q (By Mr. Cox) Can you testify that there has been a decrease in the values as a result of the cars on my property, the cars allegedly inoperable on my property?

A Are you asking for an opinion?

Q Yes.

A In my opinion, yes, any unkept property causes a decrease in value. As I said earlier, I cannot quantify that decrease. It affects the marketability of the property.

Q Has anyone complained to you that they have suffered a decrease in their property value? I realize that you gave an opinion under oath, but I am now asking you if anyone else has complained to you?

A Well, over the years, Mr. Cox, from buyers of property in 1980 or 1981, those who bought at the peak of the market in Houston, yes, I received many complaints about property valuation not being what it was in 1981 or whatever.

Are you asking if I received any specific complaints about your property?

Q Yes, I am.

A I think that in the context of your question that I have not had anyone come to me and say, "Those junked cars on Mr. Cox's property are causing my property to be unmarketable." Is that your question?

Q Thank you. Have you had your property appraised recently?

A No, I have not had my property appraised recently.

Q You stated earlier that occasionally there are other cars that are inoperable in the subdivision. How did you determine those cars to be inoperable?

A Well, the general appearance and whether or not they are registered and licensed and are streetworthy by the State of Texas is the first factor that we look at. We obviously

only have those factors to work with initially. If the car appears to be operable and/or not licensed and/or inspected in the State of Texas, or not moving, not seen on the street, stays in the position for a long period of time, then it is assumed to be inoperable.

Then we write a letter to the property owners stating that it appears to be inoperable and ask them to solve the problem or to allow us to inspect the vehicle to determine whether or not it is inoperable so that we can properly reflect the status of the vehicle in our records.

MR. DILLON: Your Honor, may I ask for a clarification on a prior ruling of the Court?

THE COURT: On what?

MR. DILLON: In my opinion, I

think Mr. Cox is going into many things that I think are irrelevant. I believe the Court instructed that you would consider it only as relates to the inquiry here today, damages and attorney's fees.

THE COURT: I said that I would separate it and that my ruling would be based on this particular case. And I will let him make his record on whatever he wants.

MR. DILLON: I just wanted to make sure. Thank you, Judge.

MR. COX: Thank you, Your Honor.

Q (By Mr. Cox) You stated that from the appearance of a car you determined it to be inoperable. And Paragraph 6 which applies to inoperable cars, is there any reference in that paragraph to the appearance; is there any reference in your exhibit, the deed restrictions, to the appearance of a

car?

A May I see the deed restrictions?

Q (Handing the exhibit.)

A Paragraph No. 6 states, "No noxious or offensive trade or activity shall be permitted on any part of any tract, and each owner and occupant shall keep their property and the streets adjoining their property clean and free of trash, inoperable cars and machinery and other junk, and shall maintain the improvements in a reasonable good state of repair."

Q Did you consider the appearance of your Exhibits 5 and 6 to be offensive?

A Are you asking me?

Q Do you consider these to be offensive relative to Paragraph No. 6?

A No.

Q Do you consider them inoperable?

A I said the assumption is that they are inoperable if they are not licensed or inspected in the State of Texas, and sit on the property for a long period of time without moving. When I say, "the appearance of a vehicle," if a car is totally smashed in the front, then obviously it is not drivable and it is inoperable.

Q Is there any damage to the appearance of those cars?

A There is no question about the appearance.

THE COURT: First you say that you based it on the outdated license plate period, and that is where we are stuck.

A And the fact that they don't move, that they are not driven around. If it is sitting in one place for a long period of time, it has some effect.

A (By Mr. Cox) You made reference earlier to the general appearance of the subdivision in general. Would you recognize any other conditions which you would consider to be damaging to the subdivision?

I would like to present, if I may, Defendant's Exhibit No. 1. Would you, from this photograph, consider this to be offensive?

MR. DILLON: I object, Your Honor, as I don't believe that Mr. Cox has laid the predicate for the admissibility of testimony regarding this photograph.

THE COURT: Let her identify it, if she can.

A This is on property that belonged to Mr. Victor Rogers, and Mr. Rogers received several letters regarding the condition of his property. He took steps to clean it up.

Q (By Mr. Cox) Do you admit that Mr. Roger's property is in the Boudreaux Subdivision?

A That is correct. It is on the corner of Boudreaux Estates Drive and Bayonne Circle.

MR. COX: May I present this to Mr. Dillon?

MR. DILLON: Again, Your Honor, I would like to object to Defendant's Exhibit No. 1. Mr. Cox hasn't laid a proper predicate; number 2, on the grounds of relevancy.

THE COURT: Overruled. It will be admitted.

(At this time Defendant's Exhibit No. 1 was admitted into evidence, copy of which is included under separate cover and made a part of this record.)

Q (By Mr. Cox) Mrs. Tolleson, I would

also like to show you Defendant's Exhibit No. 2, and ask you if you could identify this property and the items shown there?

A Yes. This is the property owned by Mr. John Sydnor, Lot 159, Section 2, of Boudreaux Estates. It sits on the corner of Lucien and Boudreaux Estates Drive. And Mr. Sydnor also received several letters regarding the condition of his property. Yesterday or the day before he was placing the boat in the garage and was cleaning up the property.

The point is, Mr. Cox, that there are other violations, but when the individuals are contacted they solve the problem, clean up their properties.

Q Is this property located in the Boudreaux Estates Subdivision?

A Yes, sir. It is Lot 59, Section 2.

Q Are you aware how long this boat and the conditions depicted in Defendant's Exhibit No. 2 have been in existence?

A I can't quote that to you. I don't know for sure.

Q Do you have any of your first correspondence to Mr. Sydnor regarding the condition of this property?

A There have been several letters over the years regarding the condition of his property, probably going back as far as 1987 or 1987.

Q And it has existed in that condition?

A No. They weren't--I don't understand your point, Mr. Cox.

Q In this exhibit there is a boat and there is trash sitting on this property. I am trying to determine if this condition existed in excess of--

for convenience let's say--2 years?

A No.

Q Do you have any records or letters directing the owner of this property to improve or clean or remove this boat; any correspondence at all?

A That is correct. Yes, we do.

Q You do. Do you have it with you today?

A No, I do not.

Q I would also like to show you a photograph which I will designate as Defendant's Exhibit No. 3, and ask you if you can identify this property and the items depicted on it?

A Yes, that is the property owned by Joel and Windie Hammond. It is on the corner of D'jon Streets and Lowell.

Q What is your address, home address?

A It is on the corner of my street.

Q Of the same street on which you live?

A That is correct.

Q This is in the Boudreaux Estates Subdivision?

A That is correct.

Q Have you any estimate how long the conditions here as depicted have existed?

A Exactly where are you referring to?

Q The presence of the truck and the car on this property.

A Both of these are vehicles that the Hammonds drove in and out of the subdivision. As far as I can tell, they are parked on the property.

Q When did you first become aware of these cars, the cars and the truck?

A Probably when they started building their home.

Q Have you seen them being driven?

A No. As a matter of fact, they don't own those vehicles anymore. They are

not on the property.

MR. COX: I would like to submit this, Your Honor.

MR. DILLON: Your honor, I will object to the admissibility of Defendant's Exhibit Nos. 2 and 3 on the grounds of his failure to lay the proper predicate, also they are irrelevant.

THE COURT: Overruled. They will be admitted, Defendant's Exhibit Nos. 2 and 3.

How many more of those pictures do you have?

MR. COX: One, Your Honor.

(At this time Defendant Exhibit Nos. 2 and 3 were admitted into evidence, copies of which are included under separate cover and made a part of this record).

Q (By Mr. Cox) Mrs. Tolleson, I would also like to show you a photograph

which I have designated as Defendant Exhibit No. 4, and I will ask you to identify, if you can, this property depicted here.

A This is the property on the corner of Boudreaux Estates Drive and Fountainbleau. It is owned by Mr. Mark Roberts. He received multiple letters and made multiple commitments to clean this up. Has actually cleaned up most of this trash and junk at the moment. He has recently received a letter with a final request before legal action.

Q Is this property located in the Boudreaux Estates Subdivision?

A That's correct. It is on the corner of Boudreaux Estates Drive and Fountainbleau.

Q Do you have any knowledge how long the conditions as depicted there have

existed.

A I can't remember.

Q If I assumed over 5 years, would that be accurate?

A No. I don't believe that is accurate. I don't have the records in front of me to verify it, Mr. Cox.

The question is not whether other people violated deed restrictions, but whether they solved the problems when it was brought to their attention.

MR. DILLON: Are you offering this into evidence?

MR. COX: Yes, Your Honor.

MR. DILLON: Your Honor, I will object to Defendant's Exhibit No. 4 on the grounds to the failure to lay a proper predicate and also relevancy.

THE COURT: Overruled. it will be admitted.

MR. COX: Thank you, Your Honor.

(At this time Defendant's Exhibit No. 4 was admitted into evidence, copy of which is included under separate cover and made a part of this record.)

Q (By Mr. Cox) Mrs. Tolleson, in terms of damages you have stated that the subdivision has suffered, has there been any marked difference based on the exhibits you just saw, and the condition of my property, over the period beginning from the institution of this suit?

A I am sorry, but would you repeat your question?

Q Since the institution of this suit, has there been any condition in that subdivision that would create a decrease, as you have alleged, in the value of the property in the subdivi-

sion?

A I am not sure if I understand what you are referring to.

Q Has the condition of the properties depicted in these exhibits decreased the value of the properties in the subdivision?

A As I stated earlier, in my opinion any unkept property has an effect on the valuations in the subdivision. Obviously from time to time there will be unkept property, and those individuals are contacted and asked to abide by the deed restrictions. In most cases they do clean up their property and come into compliance with the deed restrictions and a lawsuit is not required.

And the condition doesn't exist for any extended period of time.

Q Do you know if the conditions as

depicted in these photographs exist today, this very day, in the subdivision?

A I believe I commented on that as you gave me the photographs, Mr. Cox.

Q I am asking for your recollection.

MR DILLON: Your Honor, I will object. I think she told Mr. Cox she answered the question.

THE COURT: I didn't hear her answer to it if she said today.

A May I see the exhibit, please?

THE COURT: The question is not did they clean them up. The question is whether they exist today, the 27th of February, 1990?

A These conditions do not exist today.

MR. DILLON: I just want to clarify the record. What exhibit was Mrs. Tollerson referring to when she made that answer?

A A picture of Mr. Mark Roberts' house

and a picture of a trailer that is on the property of Mr. Victor Rogers.

MR. DILLON: Defendant's Exhibit No. 1 and No. 4; for the purpose of the record, Mrs. Tolleson, you were referring to Defendant's Exhibits 1 and 4?

A That is correct.

Q (By Mr. Cox) When you made the inspection of the cars on my property, where were they located?

A I did not inspect the cars on your property, Mr. Cox. I am not a mechanic. I am not capable of inspecting the cars. I did come to your property to inspect the condition of the property with you and try to resolve this situation without filing a lawsuit.

Q A determination was made that the cars were offensive. I am asking you for the location of the cars at the time that determination was made, do

you know?

A At the time we received the first Maintenance Committee report, the Blue Fiat was parked in the side yard with grass growing up around it. The red LTD was parked. There were several cars parked in the front yard on the driveway. There were 2 cars without hoods on them. There was one auto hood leaning up against the fence.

Q Do you have photographs of those conditions?

A Do I have photographs?

Q Do you have photographs?

A No.

Q Have you not presented them to date to substantiate the condition of the property and damage that they caused to the subdivision?

A As I said, I do not have photographs. In the records there is a photograph

of the cars sitting on the side of the property and the red LTD, I believe, sitting in the front of the property. They are Polaroid pictures and very unclear, so I did not bring them today because I didn't think that they were as clear as the ones you are looking at.

Q Plaintiff Exhibit #2 shows 2 cars. From your knowledge, where are these located; where are these cars located on the property?

A They are parked at the back of the house.

Q The back of the property?

A The back side of the property. Behind the house on the back side of the property.

Q That would indicate that the house is closer to the road than the cars are?

A That is correct.

Q I will show you Plaintiff's Exhibit No.3. Would the same conditions apply here?

A That is correct. All of these pictures, Plaintiff's exhibits, were taken on the same day.

Q And all these cars are behind the house on the property?

A That is correct, but visible from the road.

Q Regarding the increase in your maintenance fees, which you complain has been caused as a result of this action, you have stated that as a result of this lawsuit against myself that you have increased the maintenance fee. Is there any reason why the maintenance fees were increased?

A The maintenance fees were increased so we would have funds available to keep the Association operating and be

able to pay the legal fees incurred in this litigation.

Q Have you previously sued anyone for deed restriction violations?

A Yes, we have.

Q Did you not find it necessary to increase the fees then?

A No, we did not. The cost of that litigation was nominal as compared to the cost of this litigation, Mr. Cox.

Q You stated that the Maintenance Committee was a group of individuals who first determined the cars to be inoperable.

A The original report was signed by 2 individuals, Larry Trimm and Dwayne Prejean.

Q Do you have that complaint with you today?

A Yes, I do.

Q Was any other complaint made regard-

ing the cars on my property?

A There are no written complaints in the file regarding cars on your property, Mr. Cox, if that is your question?

Q Has it been your established policy to take complaints by writing?

A Yes, that is the established policy. But we also invited individuals to talk to the Maintenance Committee members. If they think there is a problem and wish the Maintenance Committee to take a look at it, they are invited to point it out verbally. Many individuals are reluctant to file written complaints for fear of retaliation or long-term effects in their relationship with their neighbors.

Q Are you familiar with property owned by Joe Williams?

A Yes, I am.

Q Have you had any correspondence with him regarding inoperable cars on his property?

A Yes, sir, we have.

Q Would you have that letter or correspondence today?

A No, sir, I do not.

Q Do you recall the time that the correspondence was made?

A On several occasions they have received a letter, not of the same vehicle, but about a vehicle that appeared to be inoperable on their property. I cannot tell you the exact time frame.

Q Is Mr. Joe Williams a property owner in this subdivision?

A Yes, he is.

Q Do you recall the date of the first correspondence to him?

A No, Mr. Cox, I cannot.

Q Was that correspondence in reference to an automobile?

A I do not recall, Mr. Cox. I know that he has received at least 2 separate letters in regard to an automobile--not the same automobile--but in regard to an automobile.

Q When the Maintenance Committee makes a report to you, do they express how they determined the cars to be inoperable when they state that they are inoperable?

A I have answered that question, Mr. Cox.

MR. DILLON: Your Honor, I object. I think that Mr. Cox at this point is simply reiterating matters and badgering the witness.

THE COURT: Overruled.

Q (By Mr. Cox) Mrs. Tolleson, since you

have been president of the Boudreaux Estates Civic Association, I assume that you have intimate knowledge of the correspondence, maybe not all, but to most of the property owners. I am asking you if you can recollect the nature of the correspondence to Mr. Williams; was it pertaining to an outbuilding, a garage, a car, a boat, a trailer?

A I cannot possibly recall the entire history of the correspondence with the property owner. But, as I told you already, Mr. Cox, he has received, from my memory at least, 2 letters regarding a vehicle that appeared to be inoperable.

Many individuals have at some point in time received such a letter and have solved the problem by remov-

ing vehicle or storing it properly.

Q In terms of damages, do you feel that from this suit that I have caused--specifically this suit--specifically caused decreased property values? I am asking you this question in reference to the condition of the properties in the subdivision.

THE COURT: Mr. Cox, she already answered that question.

MR. COX: I will withdraw it, Your Honor.

THE COURT: All right.

Q (By Mr. Cox) Regarding your statement about slander, am I correct in assuming that the statements you attributed to me were made in correspondence to you, or were you told this by someone; how did you learn of these statements which you attributed to be slanderous?

A Most of the statements were in a letter that you sent to all of the property owners, or, I assume the majority of the property owners in the subdivision in December just prior to the special elections to increase the maintenance fee.

Q Is the expression of an opinion, slanderous--

MR. DILLON: Your Honor, I object as I think he asked the witness to give a legal conclusion which she is not competent to give.

THE COURT: Sustained.

MR. COX: I will pass the witness, Your Honor.

MR. DILLON: No further questions, Your Honor.

THE COURT: Thank you.

STEPHEN P. DILLON,

counsel for the plaintiff, appeared as a

witness in behalf of the plaintiff and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

MR. DILLON: My name is Stephen Dillon, and I am an attorney with Schimmel & Associates, PC. I was licensed to practice law in May of 1992. I have been practicing in the Houston, Harris County, Texas area since that time.

I have practiced community association law and deed restriction enforcement law since approximately February of 1985.

In Mr. Schimmel's firm, Mr. Schimmel bills out at the rate of $150 an hour, rounding to the nearest quarter of an hour, on community association work. I bill out at the rate of $120 an hour, rounding the

nearest quarter of an hour, on community association work. While the paralegals in our office bill out at the rate of $50 and hour, rounded to the nearest quarter of an hour, for community association work.

During the course of this file Mr. Schimmel, myself and the office paralegals have all had the opportunity to do work in this file.

I have here an exhibit that previously has been marked as Plaintiff's Exhibit No. 9. These are invoices reflecting billings to our client through February 9, 1990, which reflects charges through January 31, 1990. I am custodian of records for the firm of Schimmel & Associates, PC. These records and invoices that have been previously marked by myself as Plaintiff's Ex-

hibit No. 9 are business records of Schimmel & Associates, PC. They are kept in the regular course of business of Schimmel & Associates, PC.

It was within the regular course of business for an employer or representative of Schimmel & Associates, PC, with knowledge of the act, event, condition or opinion recorded in these records to make the record or transmit the information to be included in such record to a person for inclusion in the record.

These records were made at or near the time of the act, event, condition or opinion recorded, or reasonably soon thereafter. And Plaintiff's Exhibit No. 9 is an exact duplicate of the invoices previously sent to the client.

At this time I would like to

tender these to Mr. Cox, and offer them into evidence, Plaintiff's Exhibit No. 9.

CROSS EXAMINATION

Questions by Mr. Cox:

Q Are you board certified?

A No, I am not. Mr. Schimmel is.

Q Is it your practice to just assign a flat rate for a certain amount of work done rather than charge by the hour?

A No. As I previously testified, our firm charges by the hour.

THE COURT: Do you have any objections to Plaintiff's Exhibit No. 9?

You will have the opportunity to cross examine him on it.

MR. COX: I am sorry. No, I don't have any objections, Your Honor.

THE COURT: All right. It will be admitted.

(At this time Plaintiff's Exhibit No. 9 was admitted into evidence, copy of which is included under separate cover and made a part of this record.)

A Through January 31, 1990, my client has been charged the sum of $16,815 in attorney's fees in the prosecution of this matter and in defense of the counterclaim and third-party claims made by Mr. Cox.

In addition, it is the firm's policy to charge for photocopying expenses, long distance charges, delivery expenses and the like. Those through January 31, 1990 have totaled the sum of $1,438.60. Since that time there has been substantial more work done with respect to this file by myself that has not been billed yet at this time. Specifically, there was

a motion to stay filed by Mr. Cox which required me to file a response. In addition, he had a late request for a jury fee, which I filed a response to. He filed a request for a rehearing on the prior order of this Court for sanctions, which I filed a response to.

He filed a motion for recusal on the eve of trial, which I vigorously contested and filed a response to. We had a hearing on it yesterday.

It is my estimate that since that time my client has probably incurred another 15 to 20 hours worth of legal work. And through the end of this trial I expect the total fees and costs that will be billed to my client will be in the sum of $22,000. That is rather expensive for this type of litigation.

I think that some of the reasons for the expense in this litigation has been on the part of Mr. Cox who failed to comply with legitimate discovery requests of my client, in addition to discovery orders made by the Court.

In addition, Mr. Cox filed numerous pleadings of questionable merit, but under the local rules of Harris County, Texas I am forced to file responses to those pleadings and contest those.

In addition, he filed counterclaims and third-party claims against my client, where I believe he was asking for the sum of two million dollars in damage against the Association and $300,000 against individual members and officers of the Association, which was quite upsetting to my

clients. They asked me to vigorously contest those.

MR. COX: Your Honor, I object as this information is of record and documented in Plaintiff's Exhibit No. 9.

THE COURT: Sustained.

MR. DILLON: Your Honor, I am simply trying to go into some of the reasons for the costs.

THE COURT: As he said, the documents speak for themselves.

MR. DILLON: Under Section 5.006 of the Texas Property Code, in a deed restriction case, once there is a finding that a deed restriction has been violated the law says it is mandatory for a court to award the prevailing parties its reasonable and necessary attorney's fees incurred in enforcing such a restriction. And it

lists the factors that the Court is to consider in making an award of such attorney's fees.

The first factor is the time and labor required. In that regard I ask the Court to take judicial notice of the contents of this file. I think there have been over 76 pleadings filed, not counting the writ of mandamus that Mr. Cox previously filed seeking a mandamus order of this Court.

I also ask the Court to refer to the invoices which are documented work done through January 31, 1990. It is my estimate that there is approximately 170 hours worth of work done through the trial.

The other factors that the statute requires the Court look at is the novelty and difficulty of the ques-

tions presented in the case. Normally a deed restriction case, in my opinion, is a fairly routine matter, but in this case there were some novel issues presented. There was the matter of the motion for an interlocutory summary judgment, which I prosecuted on behalf of my clients in their capacity as a counter-defendant and a third-party defendant. That required some legal research into the issues of res judicata and collateral estoppel so that that motion would be properly formulated and presented to the Court.

In addition, there were motions for recusal filed in this case by both the plaintiff--

MR COX: I object once again, Your Honor. The document speaks for itself.

THE COURT: Overruled.

A Those motions for recusal were filed by both the plaintiff and by the defendant in this case, and basically presented different legal issues each time. In addition, there is the matter of prosecuting the 1st, 2nd and 3rd motions for sanctions in this case.

The other factor that the Court is to consider under the statute is the expertise, representational ability of the attorney or attorneys involved. As I stated previously, I work for the firm of Schimmel & Associates, PC, and approximately 50 percent of the practice of our firm is devoted to community association law and deed restriction enforcement. I have handled probably at least 100 deed restriction lawsuits personally,

while Mr. Schimmel has probably handled a great deal more than that. Out of those I approximately had 5 trials, in that most of these cases settle prior to trial. I personally have never lost a deed restriction case.

In addition, I think the Court should note that I average probably 2 trials a year since I have been licensed to practice law. I prosecuted personally 4 appeals, of which I won 3. In addition, I have second chaired a case to the U.S. Supreme Court, which resulted in a 8-0 opinion in favor of our client. In addition, I have second-chaired numerous appeals in front of the Court of Appeals.

As far as Mr. Schimmel, he is the principal in the firm of Schimmel & Associates, PC. He is a board cer-

tified expert in commercial real estate law. He was the lead attorney on the U.S. Supreme court case that I previously referred to. He is the former chairman of the Legal Committee for the Greater Houston Chapter of the Community Association Institute. He is the host of a weekly radio talk show broadcast on AM 700 regarding community association law and issues. In addition, he has prepared numerous legal articles and lectures on community association law.

At this time we are requesting the Court to make a total award of attorney's fees of $22,000 for service rendered through trial herein. Of that, the Court has previously, in its third order for sanctions, ordered Mr. Cox to pay the sum of

$5,500 to my client. Mr. Cox has not done so at this point, and we are requesting the Court to tax that as a cost of the court in its final judgment herein.

In addition, on top of that, we are requesting the Court to award $16,500 as reasonable attorney's fees for services rendered through trial. I am familiar with the reasonable and customary fees for the type of services rendered in this case and in similar cases in Houston, Harris County, Texas. And in my opinion the sum of $22,000 is a reasonable, necessary and customary fee for the services rendered through trial herein, considering the amount of work that was required, the sheer volume of pleadings that were done in this case.

In addition, in the event that there is an appeal to the Texas Court of Appeals, in my opinion the sum of $10,000 would be a reasonable, necessary fee for the services rendered through an appeal to the Texas Court of Appeals. If there is an application for a writ of error to the Texas Supreme Court, it is my opinion that the sum of $5,000 would be a reasonable, necessary and customary fee for either the filing or a response to an application for a writ of error to the Texas Supreme Court. In the event that there is an appeal accepted by the Texas Supreme Court, it would be my opinion that the sum of $15,000 would be a reasonable, necessary and customary fee for such an appeal to the Texas Supreme Court.

And in the event that there is

an appeal to the United States Supreme Court or an application for a writ of certiorari to the United States Supreme Court, it would be my opinion that the sum of $50,000 would be a reasonable, necessary and customary fee for those services, in that normally we would be required to hire Washington, D.C. counsel, who I found out from past experience, is very expensive. I would request the Court to make an award in those amounts in its final judgment.

THE COURT: Any further cross examination, Mr. Cox?

CROSS EXAMINATION (CONTINUED)

Questions by Mr. Cox:

Q Mr. Dillon, you made reference to the statutory provision for damages in cases where deed restriction violations have been sustained by the

Court. Is it mandatory or is it advisory?

A Section 5.0006 of the Texas Property Code is the relevant provision, and it has been ruled mandatory by the Court of Appeals. If you want me to pull the case, I have it with me.

Q Does the statute read that "it may be charged"?

A No. The Court of Appeals specifically interpreted the statutory language and said that in the event a party is successful in enforcing a restrictive covenant that the fees are mandatory, that they may be awarded in favor of the party who is successful in enforcing a restrictive covenant.

Q My question is, is it a stipulated fixed amount or is it up to, or as much as? That is what I need to be clarified.

A The statute says that the Court shall award a reasonable and necessary fee, and outlines the factors that the Court should use in determining that, which is what I previously testified to.

MR. COX: No further questions, Your Honor.

MR. DILLON: We have no further witnesses, Your Honor.

THE COURT: All right. Mr. Cox?

MR. COX: Thank you, Your Honor.

LEARY COX,

the defendant, appeared as a witness in his own behalf and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

MR. COX: My name is Leary Cox, and I live at 26106 LaFouche in Tomball, Texas 77375. I am the owner of property in Boudreaux Estates Subdi-

vision in Harris County.

This subdivision is subject to deed restrictions. Specifically Paragraph 6 of the deed restrictions require that any property owner may own cars. It prohibits inoperable cars. There is no other reference in these deed restrictions pertaining to cars. It also specifies that the property should be kept in good condition.

I bought this property in 1981, and I proceeded to construct a house on that property in about 1984. I live with my wife, Ashna Campbell, on this property.

We own 4 cars. These cars are operable and used intermittently. 2 cars are in everyday use, while 2 cars are infrequently used.

In June of '84 the Boudreaux

Estates Civic Association brought suit alleging inoperable cars. The cars have been operable, and in my opinion the suit wasn't justified. It is my opinion that no damage has been caused if the plaintiff's suit does not determine or state a specific cause of action, or from the pleadings it cannot be determined that a violation in fact did occur.

The effect of the cars in the subdivision is negligible. The cars are operable, kept in the rear of the property behind the house, which is 70 feet wide. There have been similar incidents in that subdivision where cars had been stored stationary, without current license plates, and no suit has been filed against these individuals. There are properties that are in disrepair, untidy, un-

kept, and in my estimation, in very much worse condition than my property.

Mrs. Tolleson made an appearance at my property in June of 1988, and simply alleged the cars to be inoperable. I do feel, and by my investigation, and in speaking with other property owners, I conclude that they do not find my cars or my property offensive.

MR. DILLON: Your Honor, I am going to object. I think he is trying to get in hearsay statements from other property owners regarding the condition of his property.

THE COURT: Go ahead.

MR. COX: At this time I would like to introduce a photograph which is designated as Defendant's Exhibit No. 5.

THE COURT: How many do you have?

MR. COX: 4, Your Honor.

THE COURT: Mark them all. Let's take a 20-minute break.

(At this time a short recess was had.)

MR. COX: At this time I would like to introduce photographs, Defendant's Exhibits 5 through 8.

MR. DILLON: Your Honor, I am just trying to recollect. Did Mr. Cox discuss the contents of these photographs prior to our taking a break?

At this time I would like to object on the grounds that he has failed to lay a proper predicate for the admissability of these photographs.

THE COURT: Sustained.

MR. COX: I have before me Defendant's Exhibits 5 through 8. Exhibit No. 5 depicts the property of one

property owner in the Boudreaux Estates, Claude McKnight. In this photograph there is the picture of a boat.

MR. DILLON: Your Honor, I will object to any testimony about the photographs other than identifying what they depict. I will object to any substantive testimony regarding the contents of the photographs.

THE COURT: Go ahead and identify them, then he can raise his objections to them.

MR. COX: Exhibit No. 6 is the property of one property owner by the name of Dwayne Prejean. May we exclude Exhibit No. 7. Exhibit No. 6 depicts the property of Mr. Larry Sergeant. Exhibit No. 8 depicts the property of Leary Cox.

And I would like to pass these

to Mr. Dillon.

MR. DILLON: Again, Your Honor, I thought our inquiry here today was restricted to the issues of damages and attorney's fees. On those grounds I don't feel those photographs are relevant, and I am going to object on the grounds of relevance.

THE COURT: Overruled. I will let them in for the purpose of making a record.

THE COURT REPORTER: You did not offer Exhibit No. 7; is that correct?

MR. COX: That is correct.

(At this time Defendant Exhibit-Nos. 5, 6 and 8 were admitted into evidence, copies of which are included under separate cover and made a part of this record.)

MR. COX: These photographs de-

pict the conditions of the properties in the subdivision. It is my knowledge that these conditions have existed for over 1 year and they are in violation of the deed restrictions.

In terms of damages, I will establish that my property relative to other properties is in a better kept condition and would not decrease any property value in the Boudreaux Estates Subdivision while these conditions of other property owners exist.

I would also like to say that the petition, if I may address the petition, Mrs. Tolleson simply indicated that the license plates expired on these vehicles. As a property owner I have kept my property in excellent condition. This suit that was brought, in my estimation, was

brought strictly for harassment and discrimination.

MR. DILLON: Your Honor, I object to that again. I think it goes outside the scope of the inquiry. I object on the grounds of that and on the grounds of relevancy. I ask that it be stricken.

THE COURT: Overruled. I will let it in for the purpose of making a record.

MR. COX: The property of Leary Cox has caused no change in the subdivision. It has been improved. My house was built in 1984 and was of considerable improvement to the subdivision. My cars have all been--the oldest is about 10 years, and they do not themselves create any damage. The number of cars on property do not cause any damage.

I have knowledge of boats, trailers, mobile homes located in that subdivision which have not been moved for more than 2 years, and no action has been brought, no suit has been brought against these property owners.

I have received compliments from other members of the community regarding my property. No one has accused me--

MR. DILLON: Objection to this hearsay, Your Honor.

THE COURT: Sustained.

MR. COX: At this time I will step down, Your Honor.

THE COURT: All right.

CROSS EXAMINATION

Questions by Mr. Dillon:

Q The blue Fiat X-19 that is made the subject of this suit, Mr. Cox, that

does not have a current Texas license plate or a current Texas inspection sticker at this time, does it?

A That's correct.

Q And the Ford LTD, which is also made the subject of this suit, you did not have that registered and get a Texas license plate until June of '89; is that correct?

A I have had that car located at my property for about 2 years, with an Ontario license plate on it. The car is operable.

MR. DILLON: I object, Your Honor as I believe it is nonresponsive.

A I am sorry?

You did ask if it had a license plate?

Q (By Mr. Dillon) I will rephrase my question. You did not obtain a Texas license plate for the red Ford LTD

made the subject of this suit, until June of 1989; is that correct?

A I will state that I can't say that it was June, but it was not until 1989. That is the most I can testify to.

MR. DILLON: No further questions, Your Honor.

THE COURT: Step down, unless you have something else.

MR. COX: At this time I would like to call my wife, Ashna Campbell.

ASHNA CAMPBELL

was called as a witness by the defendant and having first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Cox:

Q Will you give your name, please.

A Ashna Campbell.

Q What is your address?

A 26106 LaFouche, Tomball, Texas.

Q Do you know Leary Cox?

A Yes.

Q Are you aware of the suit that was brought against him by the Boudreaux Civic Association?

A Yes, I do.

Q How long have you lived at that address; approximately how long?

A 6 years.

Q 6 years would be accurate?

A Yes.

Q Are you familiar with other properties in the subdivision; by that, I mean do you drive around?

A Yes, I do.

Q Do you recall the condition of some of the properties in the subdivision?

A Yes, I do.

Q At this time I would like for you to identify in general terms the location of this property, just the loca-

tion. Is this property by recognition in the Boudreaux Estates?

A Yes, it is.

Q This is Defendant's Exhibit No. 6?

A Yes.

Q Would you agree that this property that is depicted here is that of Larry Sergeant's?

A Yes, it is.

Q Do you recognize Defendant's Exhibit No. 6; can you identify this as being in the Boudreaux Estates Subdivision?

A Yes, it is.

Q Would you recognize this to be the property of Dwayne Prejean?

A Yes, because he is a board member.

Q Defendant's Exhibit No. 8, do you recognize this picture depicted here to be in the Boudreaux Estates Subdivision?

A Yes, it is. It is my house.

Q It is your house?

A Yes.

Q From time to time you have observed the condition of other properties in the subdivision. You just identified Defendant's Exhibit No. 6 as that of Dwayne Prejean's. In your estimation, from your knowledge of the deed restrictions, would you conclude that that property is well kept?

A No, it is not.

Q Would it appear to be in violation of the deed restrictions?

A Yes, it is.

MR. DILLON: Your Honor, I object. I don't believe this witness is competent to testify as to whether or not it is in violation of the deed restrictions. That is all for the trier of the facts.

THE COURT: Sustained.

MR. DILLON: I ask that her answer be stricken from the record.

THE COURT: Strike it.

Q (By Mr. Cox) Defendant's Exhibit No. 6, Larry Sergeant. Would you identify the contents you see here in general terms; would you say that is construction equipment?

A Yes, it is.

Q Defendant's Exhibit No. 4, do you recognize that property as being in the Boudreaux Estates Subdivision?

A Yes, I do.

Q Is that the property of Mark Roberts?

A I don't know.

Q You do know this to be in the Boudreaux Estates Subdivision?

A Yes.

Q Did the condition exist before it was depicted in this picture?

A Yes.

Q How long have you known it to have existed?

A Before we got there. Before we started building it was like that.

Q Even before 1984?

A Yes.

Q So you would agree that it has been in this condition for 4 years?

A Yes, or more.

Q Would you agree that the condition existed as late as yesterday, February the 26th.

A Yes, it is.

Q Thank you. In your opinion, based on the exhibits and your general knowledge of the conditions in the Boudreaux Estates, is it your opinion that the property of Leary Cox has caused any damage or caused property values to decrease?

MR. DILLON: Your Honor, I will

object to this opinion testimony. There has not been a proper predicate laid for it.

THE COURT: Sustained.

MR. COX: I will pass the witness, Your Honor.

MR DILLON: No questions, Your Honor.

THE COURT: Anything else, Mr. Cox?

MR. COX: No, Your Honor.

THE COURT: Mr. Cox, I am sympathetic to your position; however, as the Judge, sympathy cannot enter into my rulings and my opinions. I can only tell you this, if you had hired a lawyer in this matter, who was worth his salt, he would have told you immediately to do something about those 2 automobiles. And as such, your problems would have probably

been over right then and there.

I note that prolonged litigation has gone on in this matter. And I know from my own personal view of the papers on file that there has been an inordinate amount of motions filed by you in defense of yourself--as you may call it--or to help you in your counterclaims, what have you.

However, all of those things caused the other side to run up attorney's fees in bundles, so to speak, and under the statute they are entitled to recover their attorney's fees.

Therefore, I find from the testimony that I have heard that the nuisance, if any, under Article 6, the inoperable automobile, has been abated, no longer exists; is that correct?

Therefore, no injunction will issue to require him to do anything at this stage, but I will enjoin him from having inoperable automobiles on his property in the future. Do you understand what I am saying?

I also find that there is insufficient evidence of damages to permit any recovery of damages by the plaintiff in this lawsuit. I am awarding attorney's fees of $22,000, which includes the $5,500 set forth in the sanctions motion; as well as $3,500 for an appeal to the court of Appeals, and $2,000 for a Writ of Error if it is applied for; $1,500 if it is granted and requires oral argument; the amount of an appeal to the Supreme Court of the United States, $25,000.

Draw your order, please.

MR. DILLON: Your Honor, may I briefly discuss with the Court the issue of damages on the matter of first impression?

THE COURT: I find that the evidence was insufficient. Stated another way, you have not proved to me by a preponderance of the evidence that you are entitled to recover damages.

MR. DILLON: I understand that, Your Honor. But I think that under this statute, the case law, that this statute is remedial. The reason why this statute was passed was because of the difficulty in cases like this in proving damages. I think that the purpose of the statute is to allow the Court discretion to award damages for each and every day of the violation without proof of any actual damages.

I do have some case law in support of that which I would like to share with the Court at this time, if I may?

THE COURT: You can go ahead and argue it.

MR. DILLON: Your Honor, first of all, in that regard, I am sure that the Court is aware that in deed restriction cases as far as obtaining injunctive relief, the courts have long recognized that there is no necessity for actual proof or irreparable harm in order to obtain injunctive relief. The only thing that is required is to show substantial breach of the restrictive covenant, and then that injunctive relief will lie.

If the court would like to review those cases, I have a couple

here; DeNina vs. Bammel Forest, which is a 14th Court of Appeals case, which was tried in Judge Wood's court. Also Calvary Baptist Church vs. Adams.

In addition, the statute sets forth that the Court can in its discretion award "civil damages" of 0 to $200 for each and every day of the violation of the restrictive covenant where it finds such a violation.

While there is little case law on what the legislature intended that civil damage provision to mean, or whether the Legislature intended--in fact, there is no case law at this time--whether the Legislature intended that to mean that you have to prove your actual damages. However, there was a statute, a very old statute, a liquor control law statute,

that goes back into the early days of our history as a state. It basically provided an establishment that sold liquor was required to post a bond in the amount of $500. And that under certain circumstances if they were to sell liquor, for example, to a person who was a habitual drunkard, where a wife had gone into court and requested that liquor not be sold to that person, that the prevailing party in that case would be awarded "civil damages."

The statute in that particular circumstance refers to civil damages. And there is a Court of Civic Appeals case, that it is not necessary that there be injury to a person or property to recover under that statute, that you simply had to prove a violation and damages were available.

Finally, the other thing I would like to refer the Court to by way of an analogy is in the area of copyright law. The courts have recognized that sometimes it is difficult to prove your damages, so there has been a specific statute passed that allows statutory damages of a sum not less than $250 nor more than $10,000 at the Court's discretion. I think that that is what the Legislature intended to do with the statute. When you look at a statute that was passed as a remedial statute that had a lot of remedial provisions in it, on that basis I would ask the Court to award civil damages for at least a year and a half worth of violations. I think the evidence has proved that there were at least violations for a year and a half.

THE COURT: Mr. Dillon, I am going to stand by my ruling, but I will tell you now and the Civic Association, too, that I think the term "inoperable automobile" was not proved. And it also means a mechanical condition, not an unlicensed condition.

Were the matter before me, except for the sanctions that have been enforced, I would have held that you failed to prove it was an inoperable automobile and have awarded no relief whatsoever.

MR. DILLON: Well, the reason we produced testimony was because we never were allowed to inspect the vehicle, which was the reason for the Court's order and sanctions.

THE COURT: I didn't write the restrictions, is what I am saying. If

you want the order to reflect it, I will so find that within my discretion I don't find damages to be recoverable.

Let me make it perfectly clear. I know that you are going to appeal this case, going to try to appeal it. You have had before me a motion in forma pauperis in the first instance, which I turned down because it was interlocutory in nature. I won't stop you from filing another one, but we will have an immediate hearing on it. And I find that you are not a pauper, so be prepared to pay your costs if you want to appeal.

Understood?

MR. COX: Yes, sir.

THE COURT: Now, lest you be misled, you are enjoined from putting those cars out there again. And I am

asking you to consider it, because next time you come before me it won't be to try anything but a contempt charge. I don't want to see you here on a contempt charge, really. And you don't want to be down here either.

* * * *

No. 88-36371

BOUDREAUX ESTATES CIVIL ASSOCIATION, INC.	)	IN THE DISTRICT COURT
VS.	)	HARRIS COUNTY TEXAS
LEARY COX	)	80TH JUDICIAL DISTRICT

I, Charles W. Conroy, Jr., official court reporter for the 80th District Court of Harris County, Texas, do hereby certify that the foregoing pages constitute the complete, true and correct statement of facts had in the above entitled and numbered cause, which proceedings commenced on the 27th day of February, 1990; that I was

present at the time of said proceedings and reported same in machine shorthand; that I have caused my notes to be transcribed into typewriting under my direction and supervision.

I further testify that the exhibits included under separate cover are true exhibits included under of all exhibits admitted or offered, with the originals having been marked by me at the time of said proceedings and kept under my care, custody and control.

I further certify that the taxable cost to the defendant, Leary Cox, for this statement of facts is $400.00 .

I further certify that my shorthand reporter's certification No. 780 would expire on 12/31/90; that my office address is the 80th District Court, 301 Fannin Street, Room 503, Houston, Texas 77002; that my telephone numbers are Area (713)

221-6774; 667-8353.

WITNESS my hand this the 12th day of July, 1990.

/s/ Charles W. Conroy, Jr.
Court Reporter

- - - -

NO. 88-36371

BOUDREAUX CIVIC ASSOCIATION, INC.	*	IN THE DISTRICT COURT OF
VS.	*	HARRIS COUNTY TEXAS
LEARY COX	*	80TH JUDICIAL DISTRICT

FINAL JUDGMENT

On the 27th day of February, 1990, came on for non-jury trial Plaintiff Boudreaux Civic Association, Inc.'s request for an award of civil damages and attorney's fees in the above entitled and numbered cause, sanctions having previously been imposed against Defendant, Counter Plaintiff and Third Party Plaintiff Leary Cox, striking the pleadings of Defendant,

Counter Plaintiff and Third Party Plaintiff Leary Cox and entering a default judgment against Defendant, Counter Plaintiff and Third Party Plaintiff Leary Cox in favor of Plaintiff and Counter Defendant Boudreaux Civic Association, Inc., and Third Party Defendants Brenda Tolleson, Dianne Trimm, Larry Trimm, Susan Hughes, Pat Prejean, Dwayne Prejean, John Walton, and Sissy Doyle, as to liability. In addition, a partial summary judgment in favor of Counter Defendant Boudreaux Civic Association, Inc. and Third Party Defendants Brenda Tolleson, Dianne Trimm, Larry Trimm, Susan Hughes, Pat Prejean, and John Walton, was entered on November 17, 1989, providing that Counter Plaintiff and Third Party Plaintiff Leary Cox take nothing on his claims set forth in paragraphs I, II, III, IV, and V of his "Counter Plaintiff Original Counterclaim".

Upon examining the Court's file and the evidence presented at trial, the Court finds that it has jurisdiction over the person and subject matter in this cause. The Court further finds that Plaintiff, Counter Defendant and Third Party Defendants are entitled to a Default judgment against Defendant, Counter Plaintiff, and Third Party Plaintiff Leary Cox as follows:

It is ORDERED, ADJUDGED and DECREED that Plaintiff Boudreaux Civic Association, Inc. have judgment against Defendant Leary Cox for a permanent injunction enjoining and prohibiting Defendant Leary Cox, his agents, servants, employees, or those acting in concert with him, from parking or keeping inoperable cars at his residence located at 26106 LaFouche, Tomball, Texas, and more particularly described as Lots 70, 71, and 72, Section 3, of Boudreaux Estates, a subdivision in Harris County,

Texas, as recorded under Clerk's File No. F497155, Film Code No. 188-12-0688, et al, of the real property records of Harris County, Texas.

It is further ORDERED, ADJUDGED and DECREED that Plaintiff Boudreaux Civic Association, Inc. have judgment against Defendant Leary Cox for the sum of $22,000.00 as reasonable attorney's fees for services rendered through trial.

It is further ORDERED, ADJUDGED and DECREED that Plaintiff Boudreaux Civic Association, Inc. have and recover from Defendant Leary Cox the sum of $3,500.00 as reasonable attorney's fees in the event of an appeal to the Court of Appeals; the further sum of $2,000.00 as reasonable attorney's fees in the event of an application for writ of error to the Texas Supreme Court; the further sum of $1,500.00 as reasonable attorney's fees in the event of

an appeal is taken by the Texas Supreme Court; and the further sum of $25,000.00 as reasonable attorney's fees in the event of an appeal or petition for writ of certiorari to the United States Supreme Court.

It is further ORDERED, ADJUDGED and DECREED that Plaintiff Boudreaux Civic Association, Inc. recover interest on the entire judgment at the rate of ten percent (10%) from the date of such judgment until such judgment is fully and finally paid, together with all costs of court, of and from Defendant Leary Cox.

It is further ORDERED, ADJUDGED and DECREED that Plaintiff Boudreaux Civic Association, Inc. have a writ of injunction and such other writs and processes as may be necessary in the enforcement and satisfaction of this judgment.

It is further ORDERED, ADJUDGED and DECREED that Counter Plaintiff and Third

Party Plaintiff Leary Cox take nothing on his claims against Counter Defendant Boudreaux Civic Association, Inc., and Third Party Defendants Brenda Tolleson, Dianne Trimm, Larry Trim, Susan Hughes, Pat Prejean, Dwayne Prejean, John Walton, and Sissy Doyle.

All relief requested by any party that is not expressly granted herein is denied.

SIGNED this the 30th day of March, 1990.

/s/William R. Powell
JUDGE PRESIDING

APPROVED AS TO FORM AND ENTRY REQUESTED:

SCHIMMEL & ASSOCIATES, P.C.

_____
STEPHEN P. DILLON
Houston, Texas 77074

Judgement and Orders affirmed and Opinion filed March 14, 1991

No. 88-36371

BOUDREAUX CIVIC ASSN., INC.	*	IN THE DISTRICT COURT OF HARRIS COUNTY, TX
VS.	*	
LEARY COX	*	80TH JUDICIAL DIST.

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

On this day, came to be considered Defendant's motion for a new trial. After consideration the court finds that said motion should be and is herein denied.

It is therefore;

ORDERED, ADJUDGED AND DECREED, that Defendant's motion for new trial is and by this order forthwith denied.

SIGNED THIS the 24 day of April 1990.

William R. Powell
Judge Presiding

From Office of: Dick Moore, Constable
Precinct No. 4, Harris County, TX

August 29, 1990

Leary Cox
26106 LaFouche
Tomball, Texas 77375

ATTENTION Leary Cox

CIVIL DOCKET NUMBER 88-36371

YOU ARE HEREBY NOTIFIED TO CALL 376-4470, IMMEDIATELY TO DISCUSS THE PAYMENT OF AN EXECUTION OF JUDGMENT.

Boudreaux Civic Association, Inc. vs. Leary Cox .

IF WE DO NOT HEAR FROM YOU IMMEDIATELY, WE WILL PROCEED TO COLLECT THIS JUDGMENT BY SEIZING ANY NON-EXEMPT PROPERTY FOUND BELONGING TO YOU ACCORDING TO LAW.

THIS NOTICE IS BEING SENT AS A COURTESY WITH THE INTENTION OF SAVING YOU TIME AND ADDITIONAL COURT COSTS.

/s/ LT. K.G. CHANDLER

DICK MOORE, CONSTABLE
PRECINCT NO. 4, HARRIS COUNTY

In the Court of Appeals
for the First District of Texas

NO. 01-90-000657-CV

LEARY COX, Appellant

V.

BOUDREAUX CIVIC ASSOCIATION, INC., BRENDA TOLLESON, DIANNE TRIMM, LARRY TRIMM, SUSAN HUGHES, PAT PREJEAN, DWAYNE PREJEAN, SISSY DOYLE, and JOHN WALTON, Appellees

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 88-36,371

OPINION

The Appellant, Leary Cox, appeals the judgment permanently enjoining him from placing inoperable cars on his property. The judgment was rendered after the appellant's pleadings were struck, and a default judgment on all issues except damages was entered in favor of appellees Boudreaux Civic Association, Inc. ("the Association"), Brenda Tolleson, Dianne Trimm, Larry Trim, Susan Hughes, Pat Prejean, Dwayne Prejean, Sissy Doyle, and John

Walton. The appellant also appeals from three orders for sanctions because of discovery abuse entered against him in the lawsuit.

On June 24, 1988, the Association filed suit against the appellant claiming that he was violating deed restrictions by keeping inoperable cars on his property. The Association sought a permanent injunction against the appellant, damages of $200 per day and attorney's fees. Suit was originally filed in the 61st District Court of Harris County.

The appellant then filed counterclaims against the Association as well as the other appellees. The appellant claimed the appellees discriminated against him in the enforcement of deed restrictions. Specifically, the appellant complained about a lawsuit filed on November 22, 1983, seeking to permanently enjoin the appellant

from using an outbuilding on his property. The appellant sought $2.5 million in damages.

On December 12, 1988, the Association filed a motion for sanctions against the appellant. The Association sought an order compelling the appellant to allow inspection of cars on his property; in addition, it sought an order imposing sanctions. In its motion, the Association stated that it had made two requests to the appellant to inspect the cars, but the appellant refused to allow the inspection. The motion referred to exhibits, which show the Association's requests and the appellant's refusal, but the exhibits are not part of the record before this Court. In his response to the motion for sanctions, the appellant contended that the exhibits attached to the motion did not constitute a request for inspection in compliance with

the Texas Rules of Civil Procedure.

On January 16, 1989, the 61st District Court ordered the appellant to allow the Association to inspect the cars on his property at 3 p.m. on January 20, 1989. In addition, the court ordered the appellant to pay $200 to the Association as reasonable attorney's fees for prosecuting the motion for sanctions.

On February 13, 1989, the Association filed its second motion for sanctions. The Association alleged that the appellant was not on his property at the time appointed for the inspection. Moreover, the Association alleged the cars were locked making it impossible for the Association to perform its inspection. In support of its motion, the Association submitted the affidavit of Brenda Tolleson, which stated that the appellant was not on his property at the time of the attempted

inspection; the cars were locked, and the appellant did not leave the keys. The appellant filed a response to the motion in which he claimed he had fully complied with the order of the court by allowing the Association to enter his property for the inspection and by paying $200.

On February 27, 1989, the 61st District Court entered its second order for sanctions. The court granted the Association's second motion for sanctions and ordered the appellant to allow the Association to inspect the cars with a mechanic at 3 p.m. on March 31, 1989. On that day, the cars were locked, and the appellant refused to furnish the keys or unlock them.

The appellant sought production of all records of the Association.[1] The

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The appellant does not refer this Court to his request f production, and we are unable to locate it in the record. are able to locate the Association's response to the appellant's request.

BEST AVAILABLE COPY

Association responded to the request for production by stating that some of the records were protected by the attorney-client and/or work-product privileges, but it would not produce other records.

On July 27, 1989,the 61st District Court ordered the Association to produce those records not claimed as privileged within 20 days for inspection by the appellant and to produce those records claimed as privileged within 20 days for in camera inspection. On August 29, 1989, after an in camera inspection, the 61st District Court determined a portion of the records were privileged and were not discoverable.

An appointment for the appellant to inspect the Association's records was set for 10 a.m. on August 9, 1989. The Association made arrangements for an attorney to be present. However, when the appel-

lant arrived, he stated that he had not received sufficient notice of the appointment and could not begin his inspection.

Consequently, on August 9, 1989, the appellant and Tolleson agreed to a schedule for the inspection of the records. The agreement provided that either party would give 24-hours notice to the other if he was unable to meet the schedule.

On the same day, Tolleson sent the appellant a modified schedule; the schedule was identical to the one previously agreed to except August 16, 21, and 28 were eliminated, and the time for the inspection was changed. On August 14, 1989, the appellant responded that none of the dates after August 18 were feasible for him. He asked that the records be made available Monday through Friday from 9 a.m. to 5 p.m. beginning August 24, 1989. He stated that he would inspect the records on

August 16, 17, and 18 at 1 p.m.

Tolleson responded, on August 15, that August 16 was not available for inspection since the Association's attorney could not be present. Tolleson also stated that the records would not be available August 21 through August 25, 1989, because she would be on vacation.

The appellant failed to appear at appointed times for inspection on August 31, September 1, and September 5.

Tolleson offered to allow inspection of the records from 9 a.m. to 6 p.m. on September 11 and 12, 1989, but the appellant did not confirm either date. As a result, the Association did not make arrangements for its attorney to be present. The appellant appeared to inspect the records on September 2, 1989; however, because the Association's attorney was not available, Tolleson refused to allow the

appellant to inspect the records.

On October 16, 1989, the appellant filed a motion for contempt against Tolleson claiming she failed to make the Association's records available for inspection in violation of the court's order. No order holding Tolleson in contempt appears in the record.

On September 5, 1989, the Association filed a motion for recusal of Judge Shearn Smith of the 61st District Court. The Association alleged that Don Sheldon Smith, Judge Smith's son, was likely to testify concerning the appellant's counterclaims. Don Sheldon Smith represented the Association in the lawsuit against the appellant filed on November 22, 1983, the lawsuit was the basis of appellant's counterclaims. On September 8, 1989, Judge Smith entered an order recusing himself.

The appellant then filed a motion

for sanctions against the Association. The appellant claimed that the Association's motion to recuse Judge Smith was brought for the purposes of delay. The appellant alleged that no basis existed for the recusal of Judge Smith. On November 3, 1989, the 80th District Court denied the appellant's motion for sanction.

On November 17, 1989, the 80th District Court rendered a partial summary judgment in favor of appellees. The court found that the appellant's counterclaims were barred by res judicata, collateral estoppel, and the statute of limitations. Therefore, the court entered a take-nothing judgment against the appellant on his counterclaims.

On December 5, 1989, the Association filed its third motion for sanctions against the appellant. The Association alleged that the appellant had violated two

court orders by failing to allow an inspection of the cars. In addition, the Association claimed that the appellant engaged in a pattern of harassment in relation to the order authorizing his inspection of the Association's records. The Association contended that the appellant repeatedly asked for changes in the schedule for inspection, failed to appear at agreed times for inspection, and failed to confirm inspection dates. The association also alleged that the appellant failed to appear at his duly noticed deposition on September 28, 1989.

On December 12, 1989, the appellant filed his response to the Association's third motion for sanctions. The appellant claimed his deposition was not necessary and would not produce any evidence relevant to the cause of action. Additionally, the appellant contended that

he did not appear at his deposition because he did not receive proper notice. He also asserted that he had a right to inspect the Association's records, which was being denied by the Association's refusal to produce the records.

On January 5, 1990, the 80th District Court entered the third order for sanctions against the appellant. The Court ordered to appellant to appear for his deposition on January 11, 1990, at 2 p.m. In addition, the court struck the appellant's pleadings and entered a default judgment against him on all issues except damages. The court also ordered the appellant to pay the Association's attorney's fees of $5,500.

On February 9, 1990, the appellant filed a motion for recusal of Judge William Powell of the 80th District Court. The appellant stated that he was appearing

pro se in the case, and Judge Powell was biased against pro litigants. The appellant referred to three comments allegedly made by Judge Powell that demonstrated his bias. At the hearing on the motion, the Association contended that the appellant had taken Judge Powell's comments out of context. On February 26, 1990, Judge P.K. Reiter, denied the appellant's motion of for recusal.

The 80th District Court rendered final judgment. The court entered a permanent injunction against the appellant prohibiting him from keeping inoperable cars on his property. Additionally, the court awarded attorney's fees of $22,000 to the Association.

The 80th District Court filed findings of facts and conclusions of law. The court found that the appellant engaged in discovery abuse and violated two court

orders by failing to allow the Association to conduct a mechanical inspection of the cars. The court also found that the appellant engaged in discovery abuse by filing frivolous discovery motions, by filing frivolous responses to the Association's discovery motions, and by failing to attend a duly noticed deposition. The court found that the Association failed to prove it was entitled to damages. However, the court found that the evidence did show the appellant violated, and would probably violate in the future, deed restrictions prohibiting the parking of inoperable cars on his property. The court concluded that its third order for sanctions was authorized by the Texas Rules of Civil Procedure. In addition, the court concluded that the Association was entitled to a permanent injunction against the appellant, but was not entitled to recover damages from the

appellant.

In his first, second, third, and eighth points of error, the appellant complains about the imposition of sanctions for discovery abuse.

The imposition of sanctions for abuse of discovery process or failure to comply with discovery orders in the discretion of the trial court. ***Mower v. Haymes***, 780 S.W.2d 896, 898 (Tex.App.Houston [1st Dist.] no writ; ***Alexander v. Barlow***, 671 S.W.2d 531,534 (Tex.App.Houston [1st Dist.] 1983, writ ref'd n.r.e.). An appellate court will only disturb a trial court's imposition of sanctions on a showing of clear abuse of discretion. ***Mower***, 780 S.W.2d at 898. In determining whether the trial court abused its discretion, an appellate court does not determine whether it would have decided a matter in a different manner. ***Downer v. Aquamarine Operators***,

Inc., 701 S.W.2d 238, 242 (Tex. 1985) *cert denied*, 476 U.S. 1159 (1986). Rather, an appellate court determines if the trial court acted without reference to any guiding principles. *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297, 298 (Tex. 1986). If the trial court's actions were arbitrary or unreasonable, an appellate court should find an abuse of discretion. *Downer*, 701 S.W.2d at 242; *Parks v. U.S. Home Corp.*, 652 S.W.2d 479, 485, (Tex.App.--Houston [1st Dist.] 1983, writ dism'd).

In his first and second points of error, the appellant contends that the trial court erred in entering its first order for sanctions. Specifically, the appellant contends that the trial court erred in entering its first order for sanctions when the Association had made no proper discovery request for inspection, and the trial court had not previously

ordered the appellant to allow the inspection.

A court may order sanctions against a party if the party fails to comply with proper discovery requests. Tex.R.Civ.P. 215(2)(b). Thus, an order to compel compliance with a request is not necessary before sanctions may be imposed. *Gutierrez v. Walsh,* 748 S.W.2d 27, 28 (Tex.App.--Corpus Christi 188, no writ).

A request for inspection is proper if it specifies the items to be inspected and a reasonable, time, place and manner for the inspection. Tex.R.Civ.P. 267 (1)(c). Therefore, if the Association properly requested an inspection of the cars, specifying the cars to be inspected and a reasonable, time, place and manner for the inspection, the trial court did not err in entering its first order for sanctions.

The Association's first motion for sanctions refers to letters to the appellant that it asserts were requests for inspection. The appellant also refers, in his brief, to a letter dated August 18, 1988. The motion states that the letters, including the one dated August 18, 1988, are attached as exhibits. However, the exhibits are not part of the record before this court. The burden is on the appellant to insure that a sufficient record is presented to show the error of which he complains. **Tex.R.App.P. 50(d).** If the record on appeal is incomplete, every reasonable presumption will be made in favor of the trial court's ruling. ***Greenville Indep.School Dist. v. B & J Excavating, Inc.*, 694 S.W.2d 410, 412 (Tex.App.--Dallas 1985, writ ref'd n.r.e.); *Cooper v. Bowser*, 610 S.W.2d 825, 828 (Tex.Civ.App.--Tyler 1980, no writ); *see also Gallery***

Datsun, Inc. v. Metcalf 630 S.W.2d 853,855 (Tex.App.--Houston [1st Dist.] 1982, no writ) (an appellate court must assume the absent portions of the record support the trial court's findings and judgment). Thus, we assume the letters, attached to the Association's motion as exhibits, were proper requests for discovery. The trial court did not err in entering its first order for sanctions.

We overrule the appellant's first and second points of error.

In his third point of error, the appellant contends that the trial court erred in entering its second order for sanctions. Initially, the appellant contends that the trial court erred in entering its second order for sanctions because the first order to compel inspection and for sanctions was "improper, void, vague, and without foundation." As discussed

above, the first order was not improper, void, vague, and without foundation.

The appellant then contends that the trial court erred in entering the second order because he did, in fact, comply with the first order. The appellant contends that he allowed the Association to enter his property and inspect the cars, but he refused to allow them to enter the cars; he claims that the first order did not require him to do so. An "inspection" is an examination "for the purpose of ascertaining the . . . conditions of an item." Black's Law Dictionary 716 (5th ed. 1979). Interpreting the order to require the appellant to allow the Association on his property to examine the exterior of the cars, but not to require him to allow them inside the cars, is absurd. The court's order did require the appellant to allow the Association inside the cars either by

unlocking the cars or by providing the keys to the Association. Therefore, the appellant did violate the first order.

The appellant also attacks the third order for sanctions. The appellant again contends that he did not fail to comply with any court order. He contends that he fully complied by allowing the Association on his property to examine the exteriors of the cars; he contends that he was not required to allow them inside the cars. As the first order required the appellant to allow the Association inside the cars, the second order required the appellant to allow the Association inside the cars either by unlocking the cars or providing the keys to the Association.

The appellant contends that the trial court abused its discretion by striking his pleadings and entering a default judgment against him as sanctions for abuse

of the discovery process.

Initially, the appellant contends that the trial court abused its discretion in entering an order imposing such harsh sanctions since it was the first order entered by that court. The 61st District Court entered the first two orders for sanctions; the 80th District Court entered the third order for sanctions. The third order struck the appellant's pleadings and entered the default judgment.

The recusal of Judge Smith did not begin the lawsuit anew; the lawsuit merely continued in a different court before a different judge. The third order for sanctions, while it was the first order for sanctions entered by the 80th District Court, was not the first order for sanctions entered against the appellant in the lawsuit. It was the third order for sanctions entered against the appellant. Thus,

the appellant's contention that the third order for sanctions, which struck his pleadings and entered a default judgment, was too harsh because it was the first entered by the 80th District Court is without merit.

The appellant next contends that the trial court abused its discretion in entering the third order for sanctions. Specifically, the appellant contends that the trial court abused its discretion in striking his pleadings and entering a default judgment against him.

A trial court abuses its discretion if the sanction imposed does not further one of the purposes for sanctions. ***Mower,*** **780 S.W.2d at 898.** The purposes for sanctions are:

> (1) to secure the party's compliance with the rules of discovery;

(2) to deter other litigants from violating the discovery rules; and

(3) to punish parties that violate the discovery rules.

Mower, 780 S.W.2d at 898 (quoting *Bodnow Corp. v. City of Hondo*, 721 S.W.2d 839, 840 (Tex.1986)).

In the present case, the trial court found that the appellant abused the discovery process. The trial court found that the appellant violated two court orders by refusing to allow a mechanical inspection of the cars; in addition, he filed frivolous discovery motions, filed frivolous responses to the Association's discovery motions, and failed to appear for a duly noticed deposition. The trial court first ordered to appellant to allow the Association to inspect his cars in January 1989; however, one year later, in January

1990, the appellant still had not complied with the court's order compelling the inspection. The sanctions imposed did further at least one of the purposes for sanctions; they punished the appellant for engaging in discovery abuse. We find the trial court did not abuse its discretion in striking the appellant's pleadings and entering a default judgment against him as sanctions for such discovery abuse. ***See, e.g., Phennel v. Roach,*** **789 S.W.2d 612, 614 (Tex.App.--Dallas 1990, no writ)** (trial court did not abuse its discretion in striking pleadings and entering a take-nothing judgment as sanctions for failure to respond to discovery requests for 10 months); ***City of Houston v. Arney,*** **680 S.W.2d 867,871-72 (Tex.App.--Houston [1st Dist.] 1984, no writ)** (trial court's action in striking defendant's pleadings was not abuse of discretion when defendant had

failed to respond to interrogatories for six months and had ignored court's order compelling answers to interrogatories); *Reimer v. Ford Motor Credit Co.*, 635 S.W.2d 162, 164-65 (Tex.App.--Houston [1st Dist.] 1982, no writ) (trial court did not abuse its discretion in striking pleadings when party failed to respond to requests for discovery made over a 10-month period notwithstanding three court orders to compel responses).

We overrule the appellant's third point of error.

In his eighth point of error, the appellant contends that the trial court abused its discretion in entering its third order for sanctions when no just cause existed for the order.

Initially, the appellant contends that the third order for sanctions could not be based on the appellant's failure to

comply with two court orders to allow the inspection of the cars since he did, in fact, comply with the orders. As discussed above, the appellant did not comply with the court orders to allow the inspection.

The appellant then contends the order for sanctions could not be based on discovery abuse in the appellant's inspection of the Association's records. He contends that he had a statutory right to inspect the records at any time during normal business hours. The appellant's right to inspect the records is not absolute. ***See Chavco Inv. Co. Inc. v. Pybus,*** **613 S.W.2d 806, 810 (Tex.Civ.App.--Houston [14th Dist.] 1981, writ ref'd n.r.e.)** (shareholder's right to inspect corporate books, granted by the Texas Business Corporation Act, is not absolute). On the record before us, the trial court was within its discretion to find that the appellant had

no right to harass the Association and Tolleson by repeatedly asking for changes in the schedule for inspection, failing to appear at agreed times for inspection, and failing to confirm inspection dates. Such conduct is an abuse of the discovery process.

Finally, the appellant contends that the third order for sanctions could not be based on his failure to attend a duly noticed deposition because he did not receive proper notice of the deposition. The Association sent notice of the deposition to the appellant on September 18, 1989. Notice was received by someone[2] at the appellant's address on September 25, 1989, yet the appellant failed to appear for his deposition on September 28. The appellant did receive proper notice of his

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[2] The signature on the receipt is not legible.

deposition. *See* Tex.R.C.P. 200 (2)(a) (reasonable notice must be served by the party proposing to take the deposition).

The trial court did not abuse its discretion in entering its third order for sanctions.

We overrule the appellant's eighth point of error.

In his fourth point of error, the appellant contends that the trial court abused its discretion in holding that a portion of the Association's records was privileged and not subject to discovery. The appellant contends that since the Association is a nonprofit corporation of which the appellant is a member, he had a right to inspect all records of the corporation.

In determining whether the trial court abused its discretion, an appellate court does not determine whether it would

have decided a matter in a different manner. *Downer* 701 S.W.2d at 242. Rather, an appellate court determines if the trial court acted without reference to any guiding principles. *Morrow* 714 S.W.2d at 298. If the trial court's actions were arbitrary or unreasonable, an appellate court should find an abuse of discretion. *Downer* 701 S.W.2d at 242; *Parks* 652 S.W.2d at 485.

Generally, all books and records of a nonprofit corporation are subject to inspection by any member. Tex. Rev. Civ. Stat. Ann. art. 1396-2.23(B) (Vernon 1980). However, the right of a member to inspect the corporate records is not absolute. *See Chavco Inv.*, 613 S.W.2d at 810 (shareholder's right to inspect corporate books, granted by the Texas Business Corporation Act, is not absolute). Therefore, the trial court did not abuse its discretion in holding, after an in camera inspection,

that a portion of the Association's records were protected from discovery by the work-product and/or attorney-client privileges; the appellant was allowed discovery of the remainder of the records. *Cf. Professional Microfilming, Inc. v. Houston,* 661 S.W.2d 767, 770 (Tex.App.--Fort Worth 1983, no writ) (trial court's discovery order adequately considered the sensitivity of the records sought where, among other things, the court set up a procedure to allow the court to examine each document before disclosure in discovery).

We overrule the appellant's fourth point of error.

In his fifth point of error, the appellant contends that the trial court abused its discretion in entering its order recusing Judge Smith.

An order granting a motion to recuse a judge is not reviewable. *District*

Judges v. Commissioners Court, 677 S.W.2d 743, 745 (Tex.App.--Dallas 1984, writ ref'd n.r.e.). Tex.R.Civ.P. 18a(f). Hence this Court cannot review the order of the trial court recusing Judge Smith.

We overrule the appellant's fifth point of error.

In his sixth point of error, the appellant contends that the trial court abused its discretion by denying the appellant's motion for sanctions for the Association's "untimely and delaying" motion to recuse Judge Smith.

As discussed above, an order recusing a judge is not reviewable. ***District Judges, 677 S.W.2d at 745; Tex.R.Civ. P. 18a(f).*** The appellant's motion for sanctions asked the trial court to take just such an action, review the order recusing Judge Smith. Since the trial court was prohibited from doing so, it did not

abuse its discretion in denying appellant's motion for sanctions.

We overrule the appellant's sixth point of error.

In his seventh point of error, the appellant contends that the trial court erred in granting the Association's motion for partial summary judgment concerning the appellant's counterclaims when genuine issues of material fact existed.

In reviewing the grant of a motion for summary judgment, this Court will take all evidence favorable to the nonmovant as true. ***MMP, Ltd. v. Jones, 710. S.W.2d 59, 60 (Tex. 1986); Goldberg v. United States Shoe Corp.***, 775 S.W.2d 751, 752 (Tex.App.--Houston [1st Dist.] 1989, writ denied). Every reasonable inference will be indulged in favor of the nonmovant, and any reasonable doubt will be resolved in his favor. ***Continental Casing Corp. v.***

Samedan Oil Corp., 751 S.W.2d 499, 501 (Tex. 1988); *Goldberg*, 775 S.W.2d at 752. Summary judgment is proper for a defendant, or a cross-defendant, if it establishes all of its affirmative defense as a matter of law. *Munoz v. Gulf Oil Co.*, 693 S.W.2d 372,373 (Tex. 1984) quoting *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671 (Tex. 1979). The movant has the burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. ***MMP***, 710 S.W.2d at 60; *Goldberg*, 775 S.W.2d at 752.

In granting partial summary judgment, the trial court found the appellant's counterclaims were barred by res judicata, collateral estoppel, and the statute of limitations. The appellant's counterclaim sought damages for the alleged selective enforcement of deed restrictions in a 1983 lawsuit filed against the appel-

lant.

The doctrine of res judicata bars parties to a suit from relitigating claims or defenses that were or could have been raised in a prior suit. *Gracia v. RC Cola-7Up Bottling Co.*, 667 S.W.2d 517,519 (Tex.-1984); *Johnson v. Levy*, 725 S.W.2d 473, 476 (Tex.App. Houston [1st Dist.] 1987, no writ). The appellant sought to assert selective enforcement of the deed restrictions in the 1983 lawsuit as a counterclaim in the present suit. The appellant could have raised the claim of selective enforcement in the 1983 lawsuit. As a result, the appellant was barred by the doctrine of res judicata from relitigating his claim of selective enforcement in the present lawsuit. The trial court did not err in granting the Association's motion for partial summary judgment since, as a matter of law, the appellant's counterclaims were barred

by res judicata.

We overrule the appellant's seventh point of error.

In his ninth point of error, the appellant contends that the trial court abused its discretion by failing to recuse Judge Powell.

If a motion for recusal is denied, the denial will be disturbed on appeal only if an abuse of discretion is shown. ***Petit v. Laware*** **715 S.W.2d 688, 692 (Tex.App.-Houston [1st Dist] 1986, writ ref'd n.r.e.); Tex R.Civ.P 18a(f).** In determining whether the trial court abused its discretion, an appellate court does not determine whether it would have decided a matter in a different manner. ***Downer*****, 701 S.W.2d at 242.** Rather, an appellate court determines if the trial court acted without reference to any guiding principles. ***Morrow*****, 714 S.W.2d at 298.** If the trial

court's actions were arbitrary or unreasonable, an appellate court should find an abuse of discretion. *Downer*, 701 S.W.2d at 242; *Parks*, 652 S.W.2d at 485.

The appellant testified, at the hearing on his motion for recusal, that Judge Powell had made three remarks indicating Judge Powell was biased against pro se litigants. However, the Association's attorney testified, at the same hearing, that the appellant had taken Judge Powell's remarks out of context. We find the trial court did not abuse its discretion in denying the appellant's motion to recuse Judge Powell.

We overrule the appellant's ninth point of error.

In his tenth point of error, the appellant contends that the trial court abused its discretion in rendering final judgment when no evidence supported the

granting of a permanent injunction.

In its third order for sanctions, the trial court struck the appellant's pleadings and entered a default judgment against him on all issues except damages. Therefore, the trial court did not abuse its discretion in rendering final judgment that granted a permanent injunction.

We overrule the appellant's tenth point of error.

In his eleventh point of error, the appellant contends that the trial court abused its discretion by awarding attorney's fees in the final judgment. Specifically, the appellant contends that attorney's fees may only be awarded if damages are awarded, and since no damages were awarded, the trial court abused its discretion in awarding attorney's fees.

The prevailing party in a cause of action based on violation of a deed

restriction is entitled to recover attorney's fees. **Tex. Prop. Code Ann.** § 5.006 (a) (Vernon 1984). Since the trial court found that the appellant violated a deed restriction by keeping inoperable cars on his property, and granted a permanent injunction on that basis, the Association was a prevailing party in a cause of action based on violation of a deed restriction. The Association was entitled to recover attorney's fees. The trial court did not abuse its discretion in awarding attorney's fees in its final judgment.

We overrule the appellant's eleventh point of error.

In his twelfth point of error, the appellant contends that no evidence supports the trial court's findings of fact.

In determining whether there is any evidence to support a finding, an

appellate court should consider only the evidence and inferences that tend to support the finding and disregard all evidence and inferences to the contrary. *Sherman v. First Nat'l Bank,* 760 S.W.2d 240, 242 (Tex.1988); *Glockzin v. Rhea,* 760 S.W.2d 665,666 (Tex.App.--Houston [1st Dist.] 1988, writ denied). If there is any evidence to support the finding the appellate court must uphold the finding. *Sherman* 760 S.W.2d at 242; *Glockzin,* 760 S.W.2d at 666.

In its first finding of fact, the trial court found that the appellant engaged in discovery abuse by failing to allow the Association to conduct a mechanical inspection of the cars. The appellant contends that no evidence established that the Association made a proper request for inspection, and no evidence established that the Association was prevented from making the inspection. As discussed previ-

ously, the Association did make a proper request for inspection. In addition, the evidence established that the appellant prevented the Association from making an inspection. Thus, there is some evidence to support the trial court's first finding of fact.

The trial court found, in its second finding of fact, that the appellant violated two court orders instructing him to allow inspection of the cars. The appellant counters that no order required him to allow the Association to make a mechanical inspection of the cars. As discussed above, both the first and second orders for sanctions instructed the appellant to allow a complete, including a mechanical, inspection of the cars. There is some evidence to support the trial court's second finding of fact.

The appellant next challenges the trial court's third finding of fact. The trial court found that the appellant engaged in discovery abuse in inspecting and attempting to inspect the books and records of the Association. As discussed above, the evidence established that the appellant engaged in discovery abuse in inspecting and attempting to inspect the records of the Association. Therefore, there is some evidence to support the trial court's third finding of fact.

In its fourth finding of fact, the trial court found that the appellant engaged in discovery abuse by filing frivolous discovery motions and frivolous responses to discovery motions. The appellant contends that this finding is "absurd" since the trial court made no ruling that any of his motions or responses were frivolous. The evidence demonstrated that the

appellant engaged in discovery abuse in response to the Association's request for inspection of the cars as well as in pursuing his inspection of the records of the Association. Based on such evidence, the trial court could find the appellant filed frivolous discovery motions and frivolous responses to discovery motions. There is some evidence to support the fourth finding of fact.

The trial court found, in its fifth finding of fact, that the appellant engaged in discovery abuse by failing to attend a duly noticed deposition. The appellant asserts that he did not receive proper notice of the deposition. As discussed above, the evidence established the appellant did receive proper notice of the deposition. Hence, there is some evidence to support the trial court's fifth finding of fact.

The appellant then contends that the sixth finding of fact is not supported by the first five findings of fact. In its sixth finding of fact, the trial court stated that it entered its third order for sanctions against the appellant based, in part, on the discovery abuse outlined in the first five findings of fact. The appellant contends that the discovery abuse outlined does not constitute good cause for the sanctions imposed. As previously discussed, the discovery abuse is good cause for the sanctions imposed. Therefore, there is some evidence to support the trial court's sixth finding of fact.

In its eighth finding of fact, the trial court found that after suit was filed against him, the appellant voluntarily abated the violation of the deed restrictions against parking inoperable vehicles on his property, and in its ninth

finding of fact, the trial court found that the appellant would probably violate the deed restrictions in the future by parking inoperable cars on his property unless he was enjoined from doing so. The appellant contends that the evidence did not establish the cars were inoperable and did not establish a violation of a deed restriction. As discussed above, the appellant's pleadings were struck and a default judgment was entered against him on all issues except damages. As a result, there is some evidence to support the eighth finding of fact.

Finally, the appellant attacks the tenth finding of fact. In its tenth finding of fact, the trial court found the Association proved the amount of its attorney's fees. The appellant contends that such a finding was improper because the Association was not entitled to recover

attorney's fees. However, as discussed above, the Association was entitled to attorney's fees. Therefore there is no error in the trial court's tenth finding of fact.

We overrule the appellant's twelfth point of error.

In his thirteenth point of error, the appellant contends that the trial court abused its discretion in entering its conclusions of law.

The trial court's first conclusion of law was that its third order for sanctions was authorized by the Texas Rules of Civil Procedure. As discussed above, the third order for sanctions was properly entered. Thus, the trial court did not abuse its discretion in entering its first conclusion of law.

In its second conclusion of law, the trial court concluded that the Associa-

tion was entitled to a permanent injunction against the appellant. As previously discussed, the appellant's pleadings were struck and a default judgment on all issues except damages was entered against him. Consequently, the Association was entitled to a permanent injunction against the appellant, and the trial court did not abuse its discretion in entering its second conclusion of law.

Finally, the appellant attacks the fourth conclusion of law. The trial court concluded that the Association was entitled to recover its attorney's fees pursuant to Tex. Prop. Code Ann. § 5.006. In fact, as discussed above, the Association was entitled to recover attorney's fees pursuant to Tex. Prop. Code Ann. § 5.006. The trial court did not abuse its discretion in entering its fourth conclusion of law.

We overrule the appellant's thirteenth point of error.

In their sole cross-point of error, the appellees request damages pursuant to Tex.R.App.P. 84.

This court has the authority to award damages to appellees when it determines an appeal is taken for delay and without sufficient cause. Tex.R.App.P. 84. However, this Court will not do so absent a clear showing that the applicant had no reasonable ground to believe the judgment would be reversed. ***Stewart v. Texco Newspapers, Inc.***, **734 S.W.2d 175, 177 (Tex.App.--Houston [1st Dist.] 1987, no writ)**. We find the record does not ***clearly*** show the appellant had no reasonable ground to believe the judgment would be reversed.

We overrule the appellees' sole cross-point of error.

We affirm the judgment and the orders of the trial court.

/s/D. Camille Dunn
Justice

Justices Bass and Hughes also participating.

Do not publish. Tex.R.App.P. 90.
Judgment rendered and opinion delivered
March 14, 1991
True Copy attest:
/s/Kathryn Cox
Clerk of Court

* * * *

No.01-90-00657-CV

Court of Appeals First District of Texas

COPY OF JUDGMENT

LEARY COX, APPELLANT	Appeal from the 80th District Court of Harris County, Texas (Tr.Ct. No. 88-36,371). Opinion delivered by Justice Dunn, Justices Bass and Hughes also participating
V.	
BOUDREAUX CIVIC ASSOCIATION, INC. BRENDA TOLLESON, DIANNE TRIMM, LARRY TRIMM, SUSAN HUGHES, PAT PREJEAN,	

DWAYNE PREJEAN, SISSY DOYLE,
and JOHN WALTON, APPELLEES

The cause heard today by the Court is an appeal from the orders issued by the court below on January 16, 1989, February 27, 1989, September 28, 1989, and January 5, 1990, and judgments issued by the court below on November 17, 1989, and March 30, 1990. After hearing the cause on the record of the court below and inspecting the same, it is the opinion of this court that there was no error in the orders and judgments of the court below in all things affirmed.

It is further ORDERED that the appellant, LEARY COX, pay all costs incurred by reason of this appeal.

It is further ORDERED that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Bass, Dunn, and Hughes.

Judgment entered Mar 14, 1991.

* * * *

In The Court of Appeals

for the First District of Texas

No. 01-90-00657-CV

LEARY COX, APPELLANT

VS.

BOUDREAUX ESTATES CIVIC ASSOCIATION, INC. ET AL, APPELLEE

ON MOTION FOR REHEARING

On this day came to be heard appellant's motion for rehearing... And such motion is hereby OVERRULED.

It is so ordered.

PER CURIAM

Panel consisting of Justices Bass, Dunn and Hughes.

Order entered May 2, 1991.

Kathryn Cox, Clerk of Court

* * * *

In the Court of Appeals for the

First District of Texas

No. 01-90-00657-CV

LEARY COX, APPELLANT

VS.

BOUDREAUX CIVIC ASSOCIATION, INC.

ET AL, APPELLEES

ON MOTION TO SUPPLEMENT

On this day came on to be heard appellant's motion for leave to supplement record on appeal. And such motion is hereby DENIED.

It is so ordered.

PER CURIAM

Panel consisting of Justices Bass, Dunn and Hughes.

Order entered May 16, 1991.

Kathryn Cox, Clerk of the Court.

* * * *

In The Court of Appeals for The

First District of Texas

No. 01-90-00657-CV

LEARY COX, APPELLANT

VS.

BOUDREAUX CIVIC ASSOCIATION, INC.
ET AL, APPELLEES

ON MOTION FOR REHEARING

On this day came on to be heard appellant's second motion for rehearing. And such motion is hereby OVERRULED.

It is so ordered.

PER CURIAM

Panel consisting of Justices, Bass, Dunn and Hughes.
Order entered May 16, 1991
Kathryn Cox, Clerk of the Court

* * * *

In The Court of Appeals
For the First District of Texas

NO. 01-90-00657-CV

LEARY COX, Appellant

V.

BOUDREAUX CIVIC ASSOCIATION, INC.
Appellee

On appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 88-36,371

ORDER

On this day came on to be heard appellant's motion to re-open and correct the judgment and appellant's motion for stay of mandate. After due consideration of appellant's motions, appellant's motion for stay of mandate and appellant's motion to re-open and correct the judgment are DENIED.

It is so ORDERED.

PER CURIAM

Panel consists of Justices Bass, Dunn, and Hughes.
Do not publish. Tex. R.App. P.90
Order entered January 23, 1992

* * * *

JUDGEMENT OF
THE SUPREME COURT OF TEXAS

IN THE SUPREME COURT OF TEXAS

NO. D-1171	)	September 5, 1991
	)	
LEARY COX	)	
	)	
v.	)	From HARRIS
	)	County, 1st Dis-
BOUDREAUX CIVIC	)	trict
ASSOCIATION, INC.	)	
ET AL	)	

Application of petitioner for writ of error to the Court of Appeals for the First District having been duly considered, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, denied.

It is further ordered that applicant, Leary Cox, pay all costs incurred on this application.

ORDER OF THE

TEXAS SUPREME COURT

NO. D-1171	)	October 16, 1991
	)	
LEARY COX	)	
	)	
v	)	From HARRIS, 1st
	)	District
BOUDREAUX CIVIC ASSOCIATION, INC. ET AL	)	

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

****

I, JOHN T. ADAMS, Clerk of the Supreme Court of Texas, do hereby certify that the above copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of records in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Aus-

tin, this, the 17th day of October 1991.

John T. Adams, Clerk

Signed by:
Courtland Crocker
Deputy

* * * *

IN THE UNITED STATES
SUPREME COURT
OCTOBER TERM, 1991

Leary Cox, Petitioner

vs

Texas Supreme Court
The State of Texas Case No._____

CERTIFICATE OF SERVICE

I, LEARY COX, hereby certify that a true and correct copy of the foregoing application for Writ of Certiorari was sent by certified mail return receipt requested to Mr. Stephen Dillon, Attorney of Record for Boudreaux Civic Association, at _____ _____, Southwest Freeway, Houston, Texas on this the _____ day of _____ _____, 1992.

Receipt #_____

_____
Leary Cox

IN THE UNITED STATES
SUPREME COURT
OCTOBER TERM, 1991

Leary Cox, Petitioner

vs

Texas Supreme Court
The State of Texas Case No._____

CERTIFICATE OF SERVICE

I, LEARY COX, hereby certify that a true and correct copy of the foregoing application for Writ of Certiorari was sent by certified mail return receipt requested to Mr. Dan Morales, Attorney General for the State of Texas, at P. O. Box 12548, Austin, Texas 78711-2548, on this the ___ _____ day of _____, 1992.

Receipt #_____

_____
Leary Cox

AFFIDAVIT

Before me, a notary public, in and for the State of Texas, on this day personally appeared LEARY COX who being of lawful age and qualified in all respects to make this affidavit, who being first sworn on oath says that he is the petitioner in this application for Writ of Certiorari and that the certificates of service were executed as stated therein.

Sworn before me on this _____ day of_____, 1992.

_____
Notary Public for the
State of Texas
My Commission Expires:
_____

APPENDIX B
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APPENDIX "B"

No. 88-036371

BOUDREAUX ESTATES CIVIC ASSOCIATION, INC.	*	IN THE DISTRICT COURT OF
VS.	*	HARRIS COUNTY TEXAS
LEARY COX	*	
	*	61ST JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES BOUDREAUX ESTATES CIVIC Association, Inc., hereinafter referred to as Plaintiff, complaining of LEARY COX, hereinafter referred to as Defendant, and would respectfully show the Court as follows:

I.

Plaintiff is a Texas Corporation, duly formed and operating under the laws of the State of Texas, with its principal place of business in Harris County, Texas.

Defendant resides at 26510 LaFouche, Tomball, Harris County, Texas 77375, where he may be served with process or wherever he may be found.

II.

Defendant is the owner of property located in the Boudreaux Estates Subdivision and subject to control by the Boudreaux Estates Civic Association, Inc., which property is more particularly as Lots 70, 71 and 72, Section 3 of Boudreaux Estates, a subdivision as recorded in Clerk's File No. F497155, Film Code 188-12-0688 of the Harris County Real Property Records.

III.

On May 26, 1977, BRD, Inc. established and set forth certain restrictions which were subsequently incorporated into all deeds to the lots within Section Three (3) of the Boudreaux Estates subdivision

by a document known as "Restrictions", relevant parts of which are attached hereto as Exhibit "A", and incorporated herein as if set out fully and completely, as recorded in the Harris County Clerk's Office, Clerk's File No. F391391, Microfilm No. 180-01-1417 of said Deed Records hereinafter referred to as "The Original Restrictions"; and amended by Boudreaux Estates, on September 30, 1983, and filed for record in the Real Property Records of Harris County, Texas, under County Clerk's File No. 0170951 and Microfilm No. 060-96-1344, hereinafter called "The Restrictions". An additional Amendment to Restrictions was filed and record in the Real Property Records of Harris County, Texas under Film Code 099-86-0356 and Clerk's File No. J773263. Plaintiff requests the County Clerk to provide copies of these documents at any hearing of trial

of these matters by this pleading.

IV.

Plaintiff, Boudreaux Estates Civic Association, Inc., as set out and defined in the Restrictions has been organized for the purposes of, and has been granted the power to, enforce all deed restrictions and covenants, as set out in Paragraph 18 of the Restrictions.

Paragraph 6 of the Restrictions provides: "...each owner and occupant shall keep their property and the streets adjoining their property clean and free of trash, inoperable improvements in a reasonable good state of repair..."

V.

On February 1, 1987, May 9, 1987, October 5, 1987, and October 29, 1987, Plaintiff warned Defendant, Leary Cox, that the property was not being kept free of inoperable cars, and the property was

generally not in compliance with Paragraph 6 of the Restrictions. A copy of the demand letters are attached hereto and made a part of this petition for all intents and purposes as Exhibits "B","C", "D" and "E". At this time, located on this property is a red Ford LTD with an expired Ontario license plate No. NDS679, together with an expired inspection sticker. Also, a blue Fiat Bertone X19 with an expired Texas inspection sticker dated April 1984 and Texas license Plate No. 224EKS, which expired on December, 1984. In spite of Defendant's knowledge of the restrictions and Plaintiff's requests, Defendant has not removed the inoperable cars, or in any way complied with Paragraph 6 of the Restrictions. Plaintiff would respectfully show that the failure to remove the inoperable cars from the property violates Paragraph 6 of the Declaration.

VI.

Plaintiff requests the Court to order Defendant to remove the inoperable cars from the property within thirty (30) days, to allow representatives of Plaintiff to come onto the property and remove the inoperable cars to a place of storage without interference by Defendant, his agents, servants, or others under his control, and at his expense and for a Judgment against Defendant for the cost thereof.

VII.

Defendant's violation of the deed restrictions and covenants has caused damage to Plaintiff for which it has no adequate remedy at law in that property values will be decreased throughout the neighborhood in an amount which cannot be calculated.

Pleading further, and incorporating

by reference the facts set out above, Plaintiff would show that in accordance with Texas Property Code 202.004(c), that it is entitled to civil damages of up to $200.00 per each day of the offense, which would be $99,200.00 from February 7, 1987 to June 17, 1988.

VIII.

Because of Defendant's refusal to stop violation of the restrictions of the Declaration, Plaintiff has had to employ the firm of Schimmel & Associates, P.C., duly licensed attorneys in the State of Texas, to file this cause of action, seek a temporary injunction and a permanent injunction. Plaintiff, consequently, has incurred legal fees and Court costs. In accordance with Section 5.006 of the Texas Property Code and the Declaration, Article IV, Plaintiff is entitled to its reasonable attorney's fees if it prevails in

this action. These fees shall be no less than Seven Thousand & No/100 Dollars ($7,000.00) should this matter be adjudicated at the trial court level; Fifteen Thousand and No/100 Dollars ($15,000.00) should an appeal be taken to the Circuit Court of Appeals; Twenty-five Thousand and No/100 Dollars ($25,000.00) should an appeal be taken to the Supreme Court of Texas; and Fifty Thousand and No/100 Dollars ($50,000.00 should an appeal be taken to the Supreme Court of the United States.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that:

1. Defendant be cited to appear and answer this petition;
2. A permanent injunction be issued requiring Defendant to come into compliance with the restrictions in thirty (30) days and upon Defendant's failure to do so, Plaintiff be al-

lowed to access to the property in order to remove the inoperable cars to a place of storage, at Defendant's expense and for a Judgment for the costs thereof, and Defendant be enjoined from interfering with Plaintiff in any way.

3. Daily damages of up to $200.00 per day from February 7, 1987 through trial in accordance with Texas Property Code Section 202.00(c).

4. On final hearing, Plaintiff be awarded its costs of suit, including reasonable attorney's fees as set out above and for all other relief, at law and in equity, general and specific, to which it may show itself justly entitled.

Respectfully submitted,

SCHIMMEL & ASSOCIATES, P.C.
/s/ Bruce Ian Schimmel

No. 88-036371

BOUDREAUX ESTATES CIVIC ASSOCIATION, INC.	*	IN THE DISTRICT COURT
	*	
	*	61ST JUDICIAL DISTRICT
VS.	*	
	*	
LEARY COX	*	HARRIS COUNTY TEXAS

DEFENDANT'S ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant files this, his Original Answer to Plaintiff's Original Petition in the above-styled and numbered cause, and shows the court the following:

I.

Defendant enters the following denials of matters alleged herein:

Defendant specially excepts to Plaintiff's Original Petition affirming that it "is a Texas Corporation, duly formed and operating under the laws of the State of Texas."...

Defendant specially denies the allegation that cars identified in Plaintiff's Original Petition are inoperable.

Defendant, LEARY COX, denies each and every, all and singular, the allegations in Plaintiff's Original Petition and demands strict proof thereof, with trial by jury of all issues triable as of right by jury.

WHEREFORE, Defendant, LEARY COX, requests judgment of the Court that Plaintiff, BOUDREAUX ESTATES CIVIC ASSOCIATION, INC. take nothing by its suit, and that defendant go hence with its costs without day, and for such other and further relief at law or in equity as to which he may show himself entitled.

Respectfully submitted,

/s/ Leary Cox
LEARY COX
26106 LaFouche
Tomball, Texas 77375

* * * *

#88-036371

LEARY COX - Plaintiff	In the District Court of Harris County, Texas
VS	61st Judicial District

BOUDREAUX CIVIC ASSOCIATION, INC.
BRENDA TOLLESON
DIANNE TRIMM
LARRY TRIMM
SUSAN HUGHES
PAT PREJEAN
DWAYNE PREJEAN
SISSY DOYLE
JOHN WALTON

- Defendants

COUNTER-PLAINTIFF ORIGINAL COUNTERCLAIM

To the Honorable Judge said Court:

Now comes LEARY COX a natural person referred to hereinafter as Plaintiff, resident of Harris County, Texas and files his Original Counterclaim complaining Boudreaux Civic Association, Inc., referred to hereinafter as Defendants, together and singularly with its officers, a

non-profit corporation formed and operating under the laws of the State of Texas with principal place of business located at 25910 Di Jon, and registered office at 13502 Lucien Drive, both in Harris County, Tomball, Texas 77375.

I.

Plaintiff, having acquired property with all rights, privileges and protection relevant to ownership of said property known as Boudreaux Estates an unrecorded subdivision subject to restrictions filed November 21, 1977 in the Real Property Records of Harris County under document #F381391 and later amended October 1, 1983, under document J170591, attached in part as "Exhibit A" with privilege to introduce in completeness at any hearing or trial pursuant to this action.

II.

Wherefore Plaintiff constructed on

his property an approved outbuilding prior to the construction of his residence and was prohibited by Defendants from using such outbuilding as a temporary place of abode until his residence was habitable, as was commonly and predominantly the practice known to and condoned by Defendants. Albeit Defendants brought action November 22, 1983 for permanent injunction enjoining Plaintiff from using outbuilding as a temporary residence. Notwithstanding no such action was brought against other property owners who were white caucasian, and identically held and used property. "Exhibit B" attached.

III.

Pleading further, Boudreaux Civic Association, Inc. by and through its officers on or about June 26, 1985 did consent and enter into agreement attached as "Exhibit B" and did give permission to anoth-

er property owner to construct and occupy an outbuilding as a temporary place of residence on Lot #50 in Boudreaux Estates. And that such occupancy would be for two (2) years until his residence was habitable. Whereupon Gary Mock, owner of said property, white and caucasian, constructed an outbuilding and occupied same with consent of Defendants. In considering the foregoing, Plaintiff would show that Defendants by virtue of their vested authority have discriminated against the Plaintiff, contrary to the laws of the State of Texas, because of his color, visibly black negroid race.

IV.

Whereupon Plaintiff proceeded to construct his residence, submitted plans for approval as required by the deed restriction. Plaintiff was instructed to build a residence with a minimum of 50

percent (50%) brick. The front of said residence to have one hundred percent (100%) brick. Albeit such requirement on the part of Defendants transcended in part the provision in Paragraph 3 of the amended restrictions. Without recourse and at considerable expense, Plaintiff constructed his residence in compliance with these exaggerated demands. "Exhibit A-2."

V.

Subsequent to and during the construction of Plaintiff's residence, defendants failed to impose the same fifty percent (50%) minimum brick requirement as was, and still is the requirement under the amended restriction. To which end there was constructed a residence without bricks or with less than fifty percent (50%) bricks or with synthetic and simulated materials. All with the intimate knowledge of the defendants, whose acts

and omissions has prejudiced the Plaintiff. Suffice it to say, all such residences were constructed by white caucasian property owners. And by such acts against Plaintiff because of color, race and origin, Defendants did discriminate when they failed to act likewise against other property owners.

VI.

Pleading further, Plaintiff, would show by incorporating the foregoing that Defendants engaged in a scheme to slander and defame Plaintiff's character and participated in a process of discriminatory and selective enforcement of deed restrictions in a conscious effort to remove Plaintiff from residing in this subdivision. At this instance there abound many identical and similar transactions and occurrences which Defendants have deemed violations by Plaintiff, but allowed to go

unabated by other property owners. By virtue of association with, affinity to, favor or obligation to the Defendants such conditions prevailed for considerably very long periods without any legal action.

In addition, Plaintiff would show that he has suffered immeasurable damage and that such damage permeates body, property and rights to such degree as to render it irreversible.

VII.

Whereas all premises considered, Plaintiff prays that the Defendants be cited to appear and answer these Counterclaims and that upon a hearing herein the Court enter judgement as follows:

1). that defendants take nothing against Plaintiff;

2). that Plaintiff have judgement against the Defendants for actual and exemplary damages not to exceed TWO

AND ONE HALF MILLION DOLLARS ($2,500,000);

3). that each Defendant (person) be assessed a minimum of THREE HUNDRED THOUSAND DOLLARS ($300,000) with interest;

4). that Plaintiff be awarded cost of this suit;

5). and all other such relief, at law and in equity as the court may deem proper.

Respectfully submitted,
/s/Leary Cox
26106 LaFouche
Tomball, Texas 77375

"Exhibit B"

Mr. & Mrs. Gary Mock
10323 Foxrow Lane
Houston, Texas 77064 June 27, 1985

Dear Mr. & Mrs Mock,

This letter is being sent to you in order to clarify the time periods set forth in your letter to the Boudreaux

Estates Board Members, regarding the improvements on Lot 50. Please review and return this letter with your signatures.

1. 2000 square foot barn with comfort room and servants quarters. This structure will be completed within four (4) months, and prior to moving onto your property.
2. Permanent fencing across the front of tract with temporary fencing across the middle of the tract.
3. Temporary residence of the servants quarters for a maximum time of two (2) years upon which permanent residence shall be completed.
4. Agreement to vacate premises upon failure to complete any of the above.
5. Agreement that property owner is responsible for any legal fees that may be accrued for failure of complying with restrictions.

6. Plans have been rejected, due to noncompliance of restrictions which require 50% of brick facing.

Sincerely,

/s/Dwayne Prejean

Dwayne Prejean
Boudreaux Estates Civic Association, Inc.
DP/dak
(copied from copy of letter to Mr.& Mrs. Mock dated June 27, 1985)

(Handwritten agreement: I agree to comply with all restrictions set by BECA, Inc. /s/ Gary Mock /s/ Ann Mock)

* * * *

BOUDREAUX CIVIC ASSOCIATION, INC.
Deed Restrictions

(In Part)

3. All residences must contain at least a minimum of 1350 square feet under-roof living area, exclusive of open porches and garages. No tent, trailer or mobile home shall be placed or permitted to remain on any Tract as a place of abode for a greater period of time than three (3) succes-

sive days. All improvements shall be constructed with new and attractive materials and of such materials, design and color as to create a pleasant appearance compatible with the surroundings and must be approved by BRD, Inc., or its successors or assigns, or the Civic Association prior to commencement. Such approval shall not be withheld if such improvements conform with the requirements of these Restrictions.

6. No noxious or offensive trade or activity shall be permitted on any part of any Tract, and each owner and occupant shall keep their property and the streets adjoining their property clean and free of trash, inoperable cars and machinery and other junk, and shall maintain the improvements in a reasonably good state of repair. Boats, trailers and motorhomes shall be parked and any clothes drying lines shall be located to the rear of the

residence structure and no closer to the side or rear property lines than the permitted distances and structures.

* * * *

JUDGEMENT

NO. 83-63069

BOUDREAUX CIVIC ASSOCIATION, INC.	* IN THE DISTRICT COURT * 152ND JUDICIAL * DISTRICT
VS.	*
LEARY W. COX	* HARRIS COUNTY, TEXAS

J U D G E M E N T

The above entitled cause, wherein Boudreaux Civic Association, Inc. is Plaintiff and Leary W. Cox is the Defendant, came on for hearing on November 22, 1983, with Don Sheldon Smith appearing as counsel for Plaintiff and Michael Mulloy appearing as counsel for Defendant, when both parties announced a settlement agreement had been reached as follows:

WHEREAS, Leary W. Cox has built an outbuilding on the land owned by him

known as Lots 70, 71, and 72 Boudreaux Estates, Section III, a subdivision in Harris County, Texas, and being more particularly described in Exhibit "A" attached hereto and incorporated herein for a complete property description.

WHEREAS, Boudreaux Civic Association, Inc. agrees to approve the outbuilding on Lots 70, 71 and 72, Boudreaux Estates, Section III, as required in the Restrictions filed under County Clerk's File No. F381391, Harris County, Texas, restricting the use of Plaintiff's land, said outbuilding to be used for storage purposes only.

WHEREAS, Leary W. Cox agrees that on or before January 6, 1984, he will cease staying overnight at the outbuilding, that he will use the outbuilding for storage purposes only,

and that he will mow the grass on Lots 70, 71 and 72, Boudreaux Estates, Section III, Harris County, Texas.

The court proceeded to hear the evidence and argument of counsel supporting such settlement agreement and is of the opinion and finds that such settlement agreement should be, and it is hereby, approved and made a part of this judgment. It is, accordingly, ordered, adjudged, and decreed that Defendant, Leary W. Cox, is enjoined permanently from using or causing or permitting the outbuilding on Lots 70, 71 and 72 Boudreaux Estates, Section III, Harris County, Texas to be used for purposes other than as a storage building after January 6, 1984 and it is further ordered that Defendant mow the grass on Lots 70, 71 and 72, Boudreaux Estates, Section III, in Harris County, Texas, on

or before January 6, 1984.

SIGNED: This 27 day of December, 1983.

/s/ Davie L. Wilson
Judge Presiding

* * * *

No. 88-3671

BOUDREAUX ESTATES CIVIC ASSOCIATION, INC.	* IN THE DISTRICT * COURT OF
VS.	* HARRIS COUNTY, TX
LEARY COX	* 61ST JUDICIAL DISTRICT

PLAINTIFF'S MOTION FOR SANCTIONS FOR FAILURE TO ALLOW INSPECTION OF PROPERTY

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES BOUDREAUX ESTATES CIVIC ASSOCIATION, INC., Plaintiff in the above entitled and numbered cause, and moves this Court for an Order Compelling Defendant LEARY COX to allow inspection of certain cars located at this residence in the Boudreaux Estates Subdivision, 26106 LaFouche, Tomball, Harris County, Texas,

77375, and for an order of sanctions, and in support thereof would respectfully show as follows:

I.

This suit is based on Defendant's failure to comply with applicable deed restrictions of the Boudreaux Estates Subdivision, to wit: storing inoperable cars at this residence within the Subdivision, including a red Ford LTD with expired Ontario License Plate Number NDS679; a Blue Fiat Bertone X19 with expired Texas License Number 224 EKS; and other junk surrounding and associated with the cars.

By letter dated August 18, 1988, Plaintiff's counsel requested Defendant Cox to set up convenient times to allow inspection of the cars on the subject property. This letter was sent by certified mail, return receipt requested, said receipt, reflecting delivery on Defendant

Cox on August 28, 1988. A true and correct copy of said letter is attached hereto as Exhibit "A" and incorporated herein for all purposes. Defendant Cox responded to Plaintiff's counsel's request for inspection by letter dated August 31, 1988 requesting more information. A true and correct copy of said letter is attached hereto as Exhibit "B".

On October 12, 1988, Plaintiff's counsel responded to Defendant Cox's letter dated August 31, 1988, with more specific information regarding the purpose and type of inspection Plaintiff proposed to do at Defendant's residence. Said letter was sent by certified mail, return receipt requested and was received by Defendant Cox on October 14, 1988. A true and correct copy of said letter is attached hereto as Exhibit "C" and incorporated herein for all purposes.

Despite Plaintiff's repeated for Defendant Cox to set up a convenient time to inspect the cars located at his residence, Defendant has failed and refused, and still fails and refuses to allow such inspection.

II.

In relevant part, Rule 167 of the Texas Rules of Civil Procedure provides as follows:

> Any party may serve on any other party a request to produce and permit the party making the request or someone acting on his behalf to inspect, sample, test, photograph, and/or copy any designated documents or tangible things which constitute or contain matters within the scope of Rule 166(b) with are in the possession, custody or control of the party upon whom the request is served...

Plaintiff's are well within their rights in seeking to inspect the cars located at Defendant's residence as said cars constitute the essence of Plaintiff's cause of action against Defendant. Because of Defendant Cox's repeated refusals to allow Plaintiff to inspect the inoperable vehicles, sanctions should be imposed against Defendant in accordance with Rule 215 of the Texas Rule of Civil Procedures.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that the Court enter an order allowing Plaintiff, its attorneys, and agents to inspect the cars located at Defendant Cox's residence at a time and date set by the Court, that Plaintiff recover its reasonable attorney's fees incurred in prosecuting this Motion for Sanctions, and that Plaintiff have such other and further relief, at law or in equity, general or specific, to which

Plaintiff may be justly entitled.

Respectfully submitted,

SCHIMMEL & ASSOCIATES, P.C.

/s/ Stephen P. Dillon
STEPHEN P. DILLON
Houston, Texas 77074
ATTORNEYS FOR PLAINTIFF

* * * *

No. 88-36371

BOUDREAUX ESTATES CIVIC ASSOCIATION, INC.	)	IN THE DISTRICT COURT OF HARRIS
	)	COUNTY, TEXAS
vs.	)	
	)	61st JUDICIAL
LEARY COX	)	DISTRICT

DEFENDANT'S MOTION TO POSTPONE PLAINTIFF'S REQUEST FOR RULING JANUARY 9, 1989.

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Leary Cox, Defendant in the above entitled and numbered case and moves this Court to deny the Plaintiff's motion for a ruling prior to the expiration of thirty days permitted to serve a written response or objection under Rule 167(2) of

the TEXAS RULES OF CIVIL PROCEDURE.

"The party upon whom the request is served shall serve a written response and objection, if any, within 30 days after the service of the request," not after the date on which the request is prepared. A ruling as requested by the Plaintiff would violate the rule and thereby prejudice the Defendant.

WHEREFORE, Defendant prays that the Court deny the Plaintiff a ruling on January 9, 1989 and postpone same until thirty days hence or at such time thereafter at the Court's convenience.

Respectfully submitted,

/s/ Leary Cox
LEARY COX
26106 LA FOUCHE
TOMBALL, TEXAS 77375

* * * *

No. 88-36371

BOUDREAUX ESTATES CIVIC ASSOCIATION, INC.	*	IN THE DISTRICT COURT
	*	OF HARRIS COUNTY, TEXAS
vs	*	
	*	61st JUDICIAL DISTRICT
LEARY COX	*	

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SANCTION FOR FAILURE TO ALLOW INSPECTION

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes LEARY COX, DEFENDANT, in the above entitled and numbered cause, and files this motion to deny Plaintiff's Motion for Sanctions for failure to allow inspection of property: and in support of this motion would respectfully show this Court that Plaintiff has no justifiable claims to sanctions,order cr attorney's fees against Defendant, and specifically that Plaintiff's motion is premature, insufficient and hypothetical.

I.

Whereby Plaintiff has sought sanction under the provisions of Rule 215 of the Texas Rules of Civil Procedure such may only be granted relative to Rule 167 "if a party fails to serve a written response to a request for inspection submitted under Rule 167, after proper service of the request;" or....fails to: "permit discovery as requested in response to a request for inspection submitted under Rule 167."

By the provisions of Rule 215 it is incumbent upon any party seeking sanction relative to Discovery or Inspection that the prerequisite of Rule 167(c) be satisfied and complied with, to wit:

"THE REQUEST

shall set forth the items to be inspected....and describe each item and category with reasonable particularity. The REQUEST shall specify a rea-

sonable time, place and manner for making the inspection and performing the related acts."

Defendant would plead that Exhibits "A" and "C" of Plaintiff's motion do not comply with or constitute a request as required by Rule 215 and defined by Rule 167 under which Plaintiff is seeking sanction.

II.

With reference to the foregoing, Defendant would show that the Plaintiff has failed to execute and serve the required request. And in the absence of such a mandatory requirement the Defendant is without obligation to respond, permit or otherwise react to any matter of discovery or inspection. Thus the "Plaintiff's motion for sanction for failure to allow inspection of property" is at this instance premature, lacking in factual suf-

ficiency and in all further considerations hypothetical in its premise.

Consequently Plaintiff is precluded from any sanctions, orders, or attorney's fee against Defendant.

III.

WHEREAS ALL PREMISES CONSIDERED, Defendant prays:

1) that the court denies in its entirety Plaintiff's motion for sanction for failure to allow inspection of property, together with its motion for attorney's fees and motion to show cause.

2) that Plaintiff takes nothing by their motion.

3) that Defendant, Leary Cox, be awarded his attorney's fees together with all court cost.

4) that the Defendant be granted all

other relief general and specific at law or in equity to which he may be entitled.

Respectfully submitted,

/s/ Leary Cox
Leary Cox

* * * *

No. 88-36371

BOUDREAUX ESTATES CIVIC ASSOCIATION, INC.	*	IN THE DISTRICT COURT
	*	OF HARRIS COUNTY,
VS	*	TEXAS
LEARY COX	*	61ST JUDICIAL DISTRICT

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR DISCOVERY INSPECTION

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Leary Cox Defendant in the above entitled and numbered cause and files this his response and objections to Plaintiffs' motion seeking Discovery do hereby move this court for a Protective Order as provided under Texas Rules of

Civil Procedure.

Whereas the Plaintiff has filed a motion entitled "PLAINTIFF'S MOTION FOR SANCTION FOR FAILURE TO ALLOW INSPECTION OF PROPERTY" said motion is inappropriately captioned with respect to its content and the concurrence of events. However, such a motion by virtue of its prerequisites, content and character more appropriately conforms to a motion for Discovery under Rule 167. In support of such Protective Order:

I.

Defendant would respectfully show:

1) that the Plaintiff at this juncture of the proceedings and by the nature of discovery is precluded from engaging the Discovery process.

2) that Plaintiff's motion fails to state fully and specifically the grounds upon which such motion is

based.

3) that Plaintiff's motion is deficient in its procedural requirements.

4) that Plaintiff's motion has no relevance to any fact that is of consequence in the determination of this action and would serve further to burden Defendant.

II.

Insofar as Defendant is the owner of property and automobiles located in Boudreaux Estates he has periodically received from the Plaintiff notices alleging that he maintains such automobiles in violation of applicable deed restrictions. Specifically paragraph 6 which bears the only reference to cars and reads in part that:

"...each owner and occupant shall keep their property....clean and free from trash, inoperable cars and ma-

chinery and other junk,...." However, the Plaintiff failed in every instance to identify which of the Defendant's five cars were "inoperable". A count of three cars were alleged to be "inoperable" without the Plaintiff demonstratively ascertaining the condition of the automobiles.

On or about June 6th, 1988 the Plaintiff entered, unannounced, upon Defendant's property, inspected each vehicle and identified them by make, model, color and registration numbers. Although the Plaintiff was informed that the cars were operable, the Plaintiff subsequently filed suit for an injunction against the Defendant. And therein alleged and identified two of Defendant's cars to be "inoperable" without any probative measure or supporting evidence. And at this time seeks to

obtain a Discovery order to determine whether or not the Plaintiff has a cause of action.

III.

Whereas the Defendant would show that Discovery may not be used to determine if a cause of action exists and that its sole and primary function is to obtain pertinent and relevant evidence in support of ones cause. The issue in dispute now before the Court is an issue of fact, namely: Whether Defendant's cars are inoperable as maintained on his property. Such issue of fact is the prerogative of the trier of facts, judge or jury and not ex-post discovery. As a matter of law the Plaintiff is precluded from Discovery. And is now obligated to present his evidence as obtained and calculated to determine that Defendant's cars were "inoperable" to warrant a suit for injunctive relief.

In further consideration the Plaintiff has failed to plea specifically the grounds upon which his motion is based and moreover that "...the cars located at Defendant's residence...constitute the essence of Plaintiff's cause of action." Any motion for discovery must be directly addressed to the acquisition of relevant and pertinent evidence. The essence of a cause of action is not sufficient or adequate grounds for discovery, and is fallacious in its premise to obtain an order for Discovery.

IV.

Defendant would show further that the Plaintiff's request for Discovery as privileged under Rule 167 of the Texas Rules of Civil Procedure as deficient and lacking in its procedural requirement as set forth in paragraph (1c) which reads thus:

"The request shall specify a reason-

able time, place and manner for making the inspection..."

The Plaintiff has not included any data regarding the manner of the Discovery inspection and should be denied his motion. Without the explicit manner of inspection the Discovery will be misused to ascertain whether or not cause of action exists.

Additionally, the Plaintiff's motion for Discovery has no relevance to any fact subject to Discovery that is of any consequence in the determination of this action. Whatever information that could be remotely obtained could not address the central issue at hand and all other information would be peripheral in nature. And not surpass that obtained by the Plaintiff's inspection. By whatever means Plaintiff employed, he is responsible for its propriety, competence and accuracy.

And the granting of Plaintiff's motion would serve to further burden, harass, and annoy the Defendant and infringe upon his personal, constitutional and property rights.

WHEREFORE ALL PREMISES CONSIDERED, Defendant prays that this Court will rule in his favor and deny Plaintiff their motion for Discovery and further

- that they take nothing by their motion
- that Defendant be awarded his attorney's fees together with all court costs
- that he be granted all other relief general and specific at law or in equity to which he may be justly entitled.

Respectfully submitted,

/s/ Leary Cox
Leary Cox

* * * *

No. 88-36371

BOUDREAUX ESTATES CIVIC ASSN., INC.	* IN THE DISTRICT COURT * OF HARRIS COUNTY, TX
VS.	
	* 80TH JUDICIAL DIS-
LEARY COX	* TRICT

Defendant's Motion for Rehearing on Plaintiff's Motion for Partial Summary Judgement

Now comes Leary Cox, Defendant in the above entitled and numbered cause and files this, his motion for rehearing on Plaintiff's motion for partial summary judgement and in support thereof would show as follows.

I.

Under the theory of res judicata a cause of action my only be barred if that cause was previously adjudicated on the merits by a Court of competent jurisdiction.

And there exists in the present suit an identity of parties, issue, subject matter, relief sought, and cause of action

as to matter raised or could have been raised, FRANKLIN v. RAINEY 556 S.W.2d 583. The defendant counterclaims discrimination and selective enforcement of deed restrictions and seeks damages in his relief. None of these elements are common to the prior and present suit. The issue in the 1983 suit was the use of an outbuilding as a temporary residence having less than the minimum required 1,350 square footage, as appearing in Plaintiff's petition, Exhibit "A".

Further, Defendant's counterclaims were never before the Court in any manner and is therefore unaffected by judgement on the merits and thereby precluding further a bar on principle of res judicata.

In the 1983 suit, the Defendant had no knowledge that the action of the association was discriminatory and selective and upon their statement that they were

simply enforcing the deed restriction, the Defendant could not then without proof and evidence allege any claims against the association, and to have done so would be deemed conjecture and speculative. By their own nature Defendant's counterclaims of selectivity and discrimination are subjecting and are profoundly elusive. As a result, the Defendant's counterclaims accrued subsequent to the 1983 suit and could not have been tried then, and were not tried and therefore not subject to the theory of res judicata.

Evidence of the association's selective and discriminatory practices appeared June 27, 1985, Exhibit "B", a matter of eighteen months following the entry of judgement on December 27, 1983 against the Defendant.

And coming to his knowledge about March 1987, supported by other evidence,

it was then that Defendant first became aware of the existence of facts and tangible proof of such probative value to authorize Defendant to assert his claims of selectivity and discrimination. The right or cause of action involves both the existence of a right and facts sufficient to constitute a claim for relief. See LINKEN HOGER v. AM. FIDELITY & CASUALTY COMPANY, 152, 260 S.W.2d 884,886 (1953), quoting WILLIAMS v. PURE OIL COMPANY, 124 Tex. 341, 78 S.W.2d 929,931 (1935).

A judgement is res judicata only of the present facts and conditions at the time of judgement and cannot hold as to future conditions or matters raised subsequent to judgement.

COWLING v COLLIGAN, 158 Tex. 458, 312 S.W.2d 943 (1958).

FORT WORTH STOCK YARDS CO. v. BROWN, 161 S.W.2d 549,555 (Tex.Civ.App. Ft. Worth

1942) no writ.

The facts and sequence in this counter claim do not satisfy the conditions wherein res judicata should bar Defendant's counter claims. It is obvious that Plaintiff did not meet the plea of res judicata because it has not shown that the issues are the same, that the cause of action is the same and that the relief sought is the same as in the prior suit. By these indications the trial court's decision to grant partial summary judgement on the basis of res judicata is in error.

II.

In considering collateral estoppel only an issue is considered barred from relitigation. No issue in or of Defendant's counterclaims were litigated in the prior suit for substantially the same reasons as set out refuting Plaintiff's

assertion of res judicata. Additionally in seeking to invoke the doctrine of collateral estoppel, the Plaintiff's proof for partial summary judgement fails to show that any issue of Defendant's counterclaims was fully and fairly litigated in the prior 1983 suit and that those issues were essential to the judgement consequently entered.

In the absence of identical issues between any two causes of action collateral estoppel will not hold as a bar in asserting Defendant's counterclaims. See VALLEY INTERNATIONAL PROPERTIES, INC. v. BROWNSVILLE SAVINGS & LOAN ASSOCIATION, ET AL, 581 S.W.2d 222 (Civ.App.Corpus Christi, Tex. 1979).

> "Insofar as collateral estoppel might apply to the instant suit the general rule is that collateral estoppel also operates to prevent a question of law

or an issue of fact which has once been litigated and adjudicated in a court of competent jurisdiction from being relitigated in a subsequent suit between the same parties or those in privity with them. OLIVARES v. BROADWAY HARDWARE, INC. 564 S.W.2d 195,198 (Civ. App. Corpus Christi, TX 1978) writ ref'd N.R.E. As explained above, the issues in the former cause are entirely distinct from those in the instant suit and thus collateral estoppel does not apply here either."

A review of Plaintiff's original petition shows the issue then was the use of an outbuilding. Defendant's counter-claims are based on selectivity and discrimination which matured subsequent to the former suit and constitute a distance issue. A similar holding is made in WATSON v. WISEHEART, 258 S.W.2d, 350 (Civ.App.

Galveston, Tex. 1953).

> "We have examined...the other three suits involving enforcement of the restrictions in the addition...two of these suits were dismissed. The other suit did not involve enforcement of a restriction against the use of any property in the addition for business purposes (prior) suit that the restrictions had been cancelled or terminated. (Now the issue before the Court) said (prior) suits were neither res judicata...nor did the judgement work any estoppel by judgement. (Emphasis in brackets)."

Plaintiff makes no alternative showing entitling them to partial summary judgement and the trial court's order granting same on the basis of collateral estoppel is also in error.

III.

The Plaintiff's claim that Defendant's counterclaims are barred under statute of two year limitation is not applicable under the facts of Defendant's counter suit, whose cause of action accrued upon the discovery that the action of Boudreaux Civic Association, Inc. in the 1983 suit was not "simply enforcing the restriction" as was stated then but an act of discrimination denying the Defendant a right to use his property because of his color. And upon his removal by court order, Exhibit "C", Boudreaux Civic Association, Inc. granted an identical privilege to another property owner who was white and caucasian, only eighteen months later, Exhibit "D". Obtaining this document in March of 1987 provided the Defendant with proof sufficient to assert his cause. And upon further investigation

Defendant learned that other property owners, all white, had used outbuildings of various kinds with less than the required minimum square footage as a temporary residence until they had constructed their residence.

The discovery rule states that a statute of limitation barring prosecution of an action runs from the date the nature of the injury was discovered, and not from the date the act occurred giving rise to the injury. HAYS v. HALL, 488 S.W.2d 412 (Texas 1972). The rule recognizes that in certain situations it is difficult if not impossible to discover a legal injury at a given instant and equally so for matters of racial discrimination. The two year statute of limitation as asserted by the Plaintiff is not applicable. Further, to be entitled to summary judgement the burden is upon the Plaintiff as movant to

negate the pleading of this rule by proving as a matter of law that there is no genuine issue of fact concerning the time Defendant's discovery of the nature of the injury was made. ZALE CORP. v. ROSENBAUM, 520 S.W.2d, 899 (Texas 1975). No such proof is evident in Plaintiff's summary judgement proof and it was an error of the trial court to render judgement on Plaintiff's claim to estoppel by statute of limitations. This holding of the discovery rule has been applicable in other instances. BAYOUTH v. LION OIL CO., 671 S.W.2d, 867,868 (Texas 1974) (action for damage to land). LANGSTON v. EAGLE PUBLISHING COMPANY, 719 S.W.2d, 612,615 (Tex-.App.Waco, 1986 writ ref'd N.R.E.) (libel action). Under the facts stated in Defendant's counter suit a granting of partial summary judgement is contrary to the precedents in law and leaves unresolved a

genuine issue of material fact as to whether Defendant's counter writ is within the statute of limitations and thereby precluding summary judgement as a matter of law in favor of the Plaintiff.

IV.

Pleading further Defendant's counterclaims are without limitation except to the extent of the subject matter to which they relate as set out in Texas Revised Civil Statute Article 16.069.

(a) "If a counterclaim or cross claim arises out of the same transaction or occurrence that is the basis of an action, a party to the action may file the counterclaim or cross claim even though as a separate action it would be barred by limitation on the date the party's answer is required."

(b) "The counterclaim or cross claim must be filed not later than the 30th day after the date on which the party's answer is required."

Defendant's counterclaims arise out of the same transaction and occurrence (deed restriction enforcement) that is the basis of Plaintiff's action which originates from the provision of a contract called "deed restriction." Stated differently every act of enforcement is of the same transaction, to enforce a restriction while the alleged violation may differ, the subject is always the "restrictive covenant." The same subject gives rise to the same transaction and occurrence with different issues. The duration between transactions has not been stated in the statute but is interpreted to be flexible and "may comprehend a series of many occurrences (and transactions) depending not

so much upon the immediateness of their occurrence as upon their logical relationship." MOORE v. NEW YOUR CITY COTTON EXCHANGE, 270 U.S. 619 46 S.Ct.361,(1926).

Additionally, Defendant introduced a sworn copy of the document Exhibit "D", supporting his claims to discrimination on the part of Boudreaux Civic Association, Inc. Such document could be introduced at a trial and further raise issues of unresolved material fact to preclude the granting of a summary judgement. This evidence should raise substantial fact question in the mind of the trial court. In deciding whether or not there is a disputed material fact issue precluding summary judgement, evidence favorable to the non-movant will be taken as true and every reasonable inference must be indulged in favor of the non-movant. GIBBS v. GENERAL MOTORS CORP. 450 S.W.2d 827 (Texas 1970). The trial

court's ruling is contrary to law. And such a ruling has denied Defendant the right to be heard on his counterclaims. And a correction here would be appropriate.

Wherefore, all premises considered the Defendant prays that this Court reconsiders its ruling of November 17, 1989 in the light of Paragraphs I through IV,and make whatever amendment it may deem proper.

Defendant prays further that he be granted all other and further relief general and specific at law or in equity to which he may be entitled.

Respectfully submitted,

/s/ Leary Cox

* * * *

Full text of letter dated August 18, 1988 from Bruce Ian Schimmel, Attorney at Law, to Leary Cox:

Mr. Leary Cox
P.O. Box 70203
Houston, Texas 77270

Re: Cause No. 88-36371; Boudreaux Estates Civic Assn.,Inc. vs Leary Cox

Dear Mr. Cox:

In order that we may proceed with the discovery on this matter, this letter will serve as our request for you to arrange some convenient dates and times for a mechanic, an attorney, and a representative of the Association to come and inspect the vehicles in question. We would like to have this completed by the end of August. If you respond to this request within the next 5 days, we can do this by agreement. If you do not wish to cooperate with this request, we will have no alternative but to make a Motion for Inspection and get a court order to have this discov-

ery done.

Also, as required by the court, please put your telephone number on all future pleadings which you may file.

Very truly yours,

(Signed)
BRUCE IAN SCHIMMEL

* * * *

Full text of letter to Schimmel & Associates P.C. from Leary Cox dated August 31, 1988.

SCHIMMEL & ASSOCIATES P.C.
8300 Bissonnet, Suite #170
Houston, Texas 77074

Dear Mr. Schimmel,

A speedy resolution of the matter at hand would be in the better interest of all concerned. Your letters dated 18, 1988 was received on the 29th., making it impossible to meet your request before August 31st.

I have considered your request for an inspection, in the event you are unaware

Mrs. Tolleson made two visits advisably for similar purposes. However, I would ask that you provide me with an overview of the nature and scope of the proposed inspection.

In the meantime I will review my schedule and upon your reply advise you accordingly.

VERY TRULY YOURS

_____

Leary Cox
P 916 889 792

* * * *

Full text of letter from Bruce Ian Schimmel, Attorney at Law, to Leary Cox, dated October 12, 1988: (2 pages)

Mr. Leary Cox
P. O. Box 70203
Houston, Texas 77270

Re: Your Previous Letter Dated August 31, 1988.

Dear Mr. Cox:

I did receive your original letter, although I appreciate you sending me a second copy on September 25, 1988. The

purpose of the inspection is to provide discovery in accordance the Rules of Civil Procedure. The scope of the inspection will be to start the cars to see if they are operable and to inspect the interior and exterior of the cars for licensing and permits. I was aware that Mrs. Tolleson had briefly made an entry on your property before, however, she was unable to actually make a full and complete inspection of the cars at that time has no technical knowledge regarding the same. The Association will bring a mechanic or other representative to perform the actual inspection. Please give me several times and dates within the next two (2) weeks and I will inform you of which one we choose. It would be very helpful if you would enclose a telephone number so that I could contact you by telephone regarding these matters.

I was intrigued by your statement

that a speedy resolution of the matter at hand would be in the better interest of all concerned. If you have a proposition regarding the same, please contact me either by phone or in writing and I will provide your proposal to the board of directors.

I do hope that you have realized that the Association has no desire to take any action against you based upon race, creed, or natural original and is merely trying to keep the neighborhood nice. I also hope that you realize that the other parties that you eluded to you in your pleadings have been the subject of a lawsuit which went to trial yesterday and that they abandoned the premises that they were occupying as a result of the court action. A permanent injunction and attorney's fees were also awarded the Association. Thank you for your consideration regarding these

matters.

Very truly yours,

Signed
BRUCE IAN SCHIMMEL

* * * *

Transcript - In Part

REQUEST FOR TRANSCRIPT

DCA: July 28, 1990

Cause # 880-36371

BOUDREAUX CIVIC ASSOCIATION, INC.

VS

LEARY COX

Deliver to 1st Court of Appeals
Date 7-27-90
Received by _____ Date 7-27-90

. . . . .

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* * * *

NO. 88-36371

BOUDREAUX CIVIC ASSOCIATION, INC.	*	IN THE DISTRICT COURT
VS.	*	HARRIS COUNTY TEXAS
LEARY COX	*	61ST JUDICIAL DISTRICT

NOTICE OF NO SHOW TO DEPOSE

To: Stephen P. Dilllon
8300 Bissonnet, Suite #170
Houston, Texas 77074

Please be informed that your notice to

depose came to hand on September 26, 1989, and thus not permitting enough time to make a duly appearance for this deposition. I will not therefore be in attendance.

Yours truly,

/s/ Leary Cox

Return Receipt Number P567 575 632

* * * *

No. 88-36371

NOTICE OF INTENTION TO TAKE ORAL DEPOSITION OF LEARY COX

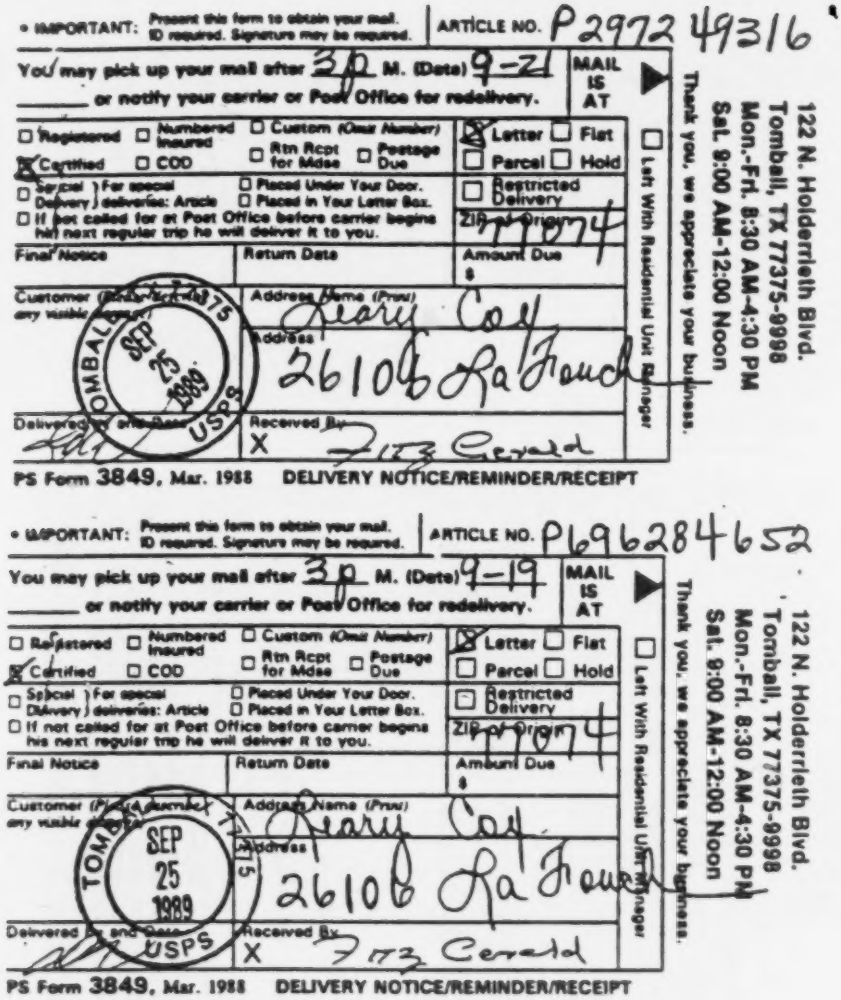
TO: LEARY COX, Pro Se, 26106 LaFouche Tomball, Texas 77375

Please take notice that Boudreaux Estates Civic Association, Inc., Plaintiff, by and through its attorney of record, Stephen P. Dillon, Schimmel and Associates, P.C., will take the oral deposition of LEARY COX, on Thursday, September 28, 1989 at 10:00 o'clock a.m., before a Certified Court Reporter, at the offices of Schimmel & Associates, P.C., whose address is 8300 Bissonnet, Suite 170, Houston, Texas 77074. The deposition is to be used in the above styled and numbered cause.

At the time of the deposition, deponent will produce those documents attached hereto under Exhibit "A", in accordance with Rule 201 of the Texas Rules of Civil Procedure.

Respectfully submitted,
Schimmel and Associates, P.C.

s/Stephen P. Dillon



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Thank you, we appreciate your business.

☐ Registered ☐ Numbered Insured ☐ Custom (Omit Number) ☒ Letter ☐ Flat
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Customer (Please Print) any visible agent | Address (Name) (Print) Geary Cox
Address 26106 La Fawn

Delivered by and Date SEP 25 1989 TOMBALL TX 77375 USPS | Received By X Fitz Gerald

☐ Left With Residential Unit Manager

PS Form 3849, Mar. 1988 DELIVERY NOTICE/REMINDER/RECEIPT

Post Office delivery receipt showing the date the notice of deposition was received.

BEST AVAILABLE COPY

P 567 575 632

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P.O., State and ZIP Code Suite Houston TX 77074	
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Certified Fee	85
Special Delivery Fee	
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Return Receipt showing to whom and Date Delivered	90
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8300 Bissonnet Suite 770
Houston Tx 77074

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5. Signature — Address
X Stephen P. Dillon

6. Signature — Agent
X

7. Date of Delivery
9/28/89

8. Addressee's Address (ONLY if requested and fee paid)

PS Form 3811, Mar. 1988 • U.S.G.P.O. 1988-212-865 DOMESTIC RETURN RECEIPT

Return receipt showing the date Mr Cox replied to the notice of deposition and receipt by Mr Dillon.

BEST AVAILABLE COPY

No. 01-90-00657CV

IN THE COURT OF APPEALS FOR THE
FIRST JUDICIAL DISTRICT FOR THE
STATE OF TEXAS

LEARY COX

\- Appellant

vs

BOUDREAUX ESTATES
CIVIC ASSOCIATION,
INC., et al - Appellee

On appeal from the 80th District Court of
Harris County, Texas No. 88-36371

* * * *

APPELLANT'S BRIEF

* * * *

Leary Cox, pro se
26106 LaFouche
Tomball, TX 77375
713/351-8865

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All page numbers refer to original court documents.

* * * *

STATEMENT OF FACTS APPLICABLE TO ALL POINTS

TO THE HONORABLE COURT OF APPEALS:

On June 24, 1988 the Association filed a suit against Leary Cox, Defendant and Appellant alleging deed restriction violation, specifically that he maintained "inoperable cars" on his property, without any measure of test or verification prior to the filing of this suit. And subsequently failed to submit any probative fact or demonstrative evidence that would

support or give evidence to a genuine cause of action. The Plaintiff's petition (TR- 2) identifies Appellant's cars by color, make, model year and license plate number and noted that the plates did expire; however, lacks any recital of fact which would give rise to a cause of action or state a claim upon which relief can be granted. DeLaGarza v Ryals 2d 854 (Texas Civ. Appeals, Fort Worth 1951 writ ref'd n.r.e.). In the absence of adequate and sufficient facts or statements that if proven true would justify the allegation, there is no cause of action and none-theless the Association prosecuted this suit by diverting the attention of the trial court away from the lack of merit in this cause and towards a series of ludicrous and improper sanctions under the discovery provisions of Texas Rules of Civil Procedure (T.R.C.P.). The trial court issued

three orders for sanction, all of which are improper, and a default judgement that is fundamentally contrary to the provisions of law. A plaintiff may not sustain a favorable judgement on an unpleaded cause. Oil Field Haulers Association v Railroad Commission, 381 SW2d 183, 191 (Tex. 1964).

But the Plaintiff in this case must offer evidence and prove his case as in judgement issued upon trial. Frymire Engineering Co., Inc. v Grantham 524 SW2d 680 (Tex. 1975). The Defendant took special exception in his answer (TR- Supplemental Transcript) to Plaintiff's allegations thus increasing the demand and the burden that such allegations be proven by the Plaintiff. No such proof appeared in the petition or presented at trial. The final judgement entered by the trial court is therefore improper and should be re-

versed. In order to sustain a default judgement it is essential that the petition show good cause. Griswold v Carlson, 249 SW2d 58, 60 (Tex.). A default judgement must be in accord with the pleadings. Mullen v Roberts, 423 SW2d (576 Tex. 1978). Further, a default judgement not supported by the pleadings is fundamentally erroneous. City of Fort Worth v. Gause, 101 SWd 221 (Texas 1937).

POINT OF ERROR I- RESTATED:

The trial court erred in granting sanctions and order to inspect property without consideration of the request for such inspection as set out in Texas Rules of Civil Procedure, rule 167.1 (c) mandating a reasonable time, place and manner for making the inspection.

On December 12, 1988 the Association filed a motion in the 61st District Court seeking sanctions against Leary Cox for

failure to allow inspection of property. Under the discovery rule 167.1(c) of Texas Rules of Civil Procedure the Association was obligated to submit a proper request to Leary Cox, specifying a reasonable time, place and manner for making the inspection. There is no such request in the records. Neither was there any request presented to the trial court which could form the basis of an order for sanction. Since there was not a proper request Leary Cox did not omit or commit any act deserving of sanctions. Further, there was no prior court order to support the Court's sanctions. On January 10, 1989 Appellant responded (TR-57) and objected to the Association's motion for sanctions and stated therein that the Association had not presented a proper request for inspection or for purposes of awarding sanctions under Rule 215.3(c),(d)

T.R.C.P. Rule 167.1(c) reads in part: "the request shall specify a reasonable time, place and manner for making the inspection and performing the related acts." The Plaintiff failed to comply with the mandatory requirements and should be precluded from obtaining sanctions. A valid request should contain all the elements of a request as set out in Rule 161.1(c). Neither the Plaintiff's letter of August 18, 1988, their motion or the signed order on January 16, 1989 expresses the manner of the inspection. If Plaintiff's letter be considered a request it is deficient and void. And cannot form the basis for the trial court's order.

In so far as the Plaintiff's motion seeks an order for inspection of Defendant's cars, the Association fails to plead and prove the relevance and materiality of such inspection or otherwise show

good cause in the furtherance of Plaintiff's suit. Crane v Tunks, 328 SW2d, 434 (Tex. 1959). The Association previously made a determination that Defendant's automobiles were inoperable and an inspection without qualification or an expression of manner would not produce any evidence beyond that established prior to the institution of this suit but permit the Association to use the discovery process as a "fishing excursion", Texhoma Stores Inc. v American Central Insurance Co., 424 SW2d, 466 (Tex.Civ.App.- 1968) writ ref. n.r.e. It is difficult to ascertain what acts or set of facts do justify the trial court's order of January 16, 1989 awarding sanctions against the Defendant and ordering inspection of property. The trial court's ruling is in error and should be reversed.

Assume momentarily that the Associa-

tion was entitled to an inspection subsequent to initiating this suit only one of two determinations could be made; that is the cars are (1) operable or (2) inoperable. If the determination was that the cars are operable the Association would be obligated to withdraw its suit. If the results of discovery directs a party to pursue or withdraw a cause the discovery exercise is no longer one in search of supporting evidence but one in search of a cause of action.

POINT OF ERROR II - RESTATED:

The trial court improperly and prematurely granted sanctions contrary to T.R.C.P. Rule #215 requiring a failure to permit discovery as requested and the granting of sanction was an error.

Rule 215.2(b) provides that sanctions may be imposed only "if a party...fails to comply with proper discovery requests or

to obey an order to provide or permit discovery." A proper request is defined in Rule 167.1(c) as having three elements, a statement of time, place and manner. The Defendant was not under any court order prior to the order for sanction. Therefore the trial court's order is premature, without foundation and contrary to law. In such instances, the trial court has exceeded its authority, in fact had no authority to make such order. No failure has occurred if no proper request was served on Appellant. It is generally accepted that a court's failure to observe a mandatory provision will render its judgement or order void. Cline v Niblo, SW2d, 633 (Texas 1928). Gayle v Alexander 75 SW2d, 706 (Tex.Civ.App.-Waco 1934).

The trial court abused its discretion when on January 16, 1989 it simultaneously awarded sanctions for failure to allow

inspection of property in the absence of a valid request and then issued an order compelling inspection of the property. The better approach would be to first issue an order compelling inspection and upon failure to comply, sanctions would then be appropriate. "A trial court abuses discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." King v Guerra, 1 SW2d, 373, 376 (Tex. Civ.App. - 1927. Bush v Vela, 535, SW2d, 803, 805 (Tex.Civ.App. - Corpus Christi - 1976).

The office of imposing sanction is to seek compliance. In this case there was nothing to comply with. There was no order prior to the imposition of sanctions and there was not a proper request tendered. Where there is no obligation to comply, there can be no failure to comply

as set out in T.R.O.C.P. Rule 215. The award of sanction is premature and invalid, until some failure to permit discovery has occurred.

POINT OF ERROR III - RESTATED:

The 61st Trial Court erred when on February 27, 1989 it granted a second order for sanctions based upon the allegation that Defendant had failed to comply with the first order of January 16, 1989 which itself was improper, void, vague and without foundation.

On January 20, 1989 the Association and agents entered Defendant's property and conducted an inspection as ordered by the 61st Court on January 16, 1989. And further sought to obtain keys to Defendant's automobiles. This requirement was not part of the court's order and Defendant refused to exceed the provisions in the court's order. On February 1, 1989

Plaintiff filed a second motion for sanctions (TR-68) complaining that Defendant had failed to comply with the first order. The more accurate complaint would be that Defendant failed to exceed the provisions of a void and improper court order.

Paragraph #3 of Brenda Tolleson's affidavit dated February 8, 1989 and included in Plaintiff's second motion for sanctions (TR-74) reads, "Defendant, Leary Cox did not appear for said inspection and did not make any arrangement for the mechanic to inspect the cars in question. The cars were parked behind the back of Defendant Cox's residence and were locked. Defendant Cox did not leave keys for the vehicles. The mechanic was unable to look inside the vehicles, open the hood of the vehicles or otherwise attempt to start the vehicles to see if they were in operating condition."

The court should be informed that Defendant's property is an open lot, unfenced and without gates or other obstruction to entry and further refer this court to the affidavit of Ashna Campbell (TR-753). The court order of January 16, 1989 had two provisions: (1) that Defendant allow inspection; (2) that Defendant pays $200.00 to Plaintiff within ten days. No other requirement. Both conditions were satisfied as set out in Defendant's motion to deny Plaintiff's second motion for sanction (TR-85). "Essentially the [Supreme] Court has determined that discovery orders should not exceed the intended scope expressed by the requesting party "General Motors v Lawrence, 651 SW2d, 732 (Tex. 1983).

In spite of the Associations exaggerated demands they made no effort to include them in their second motion for

sanction which they filed February 14, 1989 and was granted February 27, 1989 (TR-114). This second order for sanction was substantially the same as the first and again granted without just cause and is improper because no violation of the first order occurred and that the first order was itself void and improper. The alleged violation of which forms the basis of the second order. The primary purpose of sanctions is to seek compliance with discovery rules. Ebeling v Gawlik, 487 SW2d 187,190 (Tex.Civ.App. 1972).

On March 31, 1989 the Association entered Defendant's property for an inspection as ordered by the court on February 27, 1989. The Association requested keys to Defendant's cars and was denied by the Defendant as no such provision was contained in the court's order.

On December 15, 1989, ten months

after the signing of the second order, the Plaintiff presented a third motion for sanctions (TR-525) "inter alia" to the 80th District Court to which this cause was assigned upon the Plaintiff's motion to recuse Judge Smith of the 61st Court. And again alleged that Defendant had failed to comply with the order issued by the 61st Court on January 16, and February 27, 1989. By all appearances the Association had abandoned their efforts to determine a cause of action under the misnomer of an "inspection." And since March 31, 1989 made no move to obtain further discovery regarding Defendant's cars. Both orders were disposed of in the 61st Court by operation of law when no further relief was sought by the Plaintiff between March 31, 1989 and December 15, 1989 (318 days). (The intervening events are presented later). Upon submission of Plaintiff's

third motion for sanction Judge Powell struck Defendant's pleading and entered a default judgement in favor of the Association on January 5, 1990. The Association made no request to continue discovery or for an order to compel, or any order whatsoever in the 80th District Court which would form the basis of a third motion and order for sanction pertinent to discovery. Since there were no valid or current orders before or issued by the 80th District Court the entry of sanctions as severe as a default judgement is arbitrary, capricious, without just cause and constitute an abuse of discretion.

Under the facts herein such a ruling by Judge Powell sets this case apart. By striking Defendant's pleading and granting a default judgement in the absence of a proper request for discovery, no showing of good cause, relevance or materiality or

a valid current court order compelling a specific performance or a factual showing of a refusal or failure to comply with the statement of a court order. This cause demonstrates peculiar irregularities and a gross injustice. In every case where a default has been entered against a party for failure to comply with discovery orders. Such orders were issued by the court rendering such judgement. See Henson v Citizens Bank of Irving, 549 SW2d 446 (Tex.Civ.App. - 1977) no writ. Barrientos v Texas Employment Insurance, 507 SW2d 900 (Civ.App.-1974). Rainwater v Haddox, 544 SW2d 729 (Tex.Civ.App.-1976).

It should be noted again that the Defendant neither refused or failed to comply with any court order. But that the Association requested that the Defendant exceed the order of the court. This is significantly different from a failure to

comply as cited. In fact it is a failure to exceed a court order for which no sanctions are prescribed and no misconduct engaged. (General Motors v Lawrence. Default judgement under Rule 215 should be used sparingly Pohl and Hittner Judgement by Default 37 S.W.L.J., 33, June 1983) and only when clearly authorized. In those cases where the striking of a pleading has been upheld the fact situations are uniformly far more egregious than this case. Only the most deliberate of circumstances would warrant a default judgement. In Rainwater v. Haddox the trial court rendered a default judgement only when Defendant failed to answer interrogatories after five months and ignored an order to compel answers for two and a half weeks. In City of Houston v. Arney 680 SW2d 867,870, (Tex.Civ.App. 1980) no writ, the City's pleading was struck and default

judgement entered after the City failed to answer interrogatories and ignored an order to compel answers for nine weeks after due date and then failed to appear for a hearing on sanctions. Rule 215 authorizes the trial court to impose sanctions and to make orders in regard to a party's failure to comply with discovery, - as are just. When no failure to comply has occurred, no sanction should be imposed. Any other action is unauthorized, and unjust and cumulative of an abuse of discretion.

POINT OF ERROR IV - RESTATED:

The trial court abused its discretion when on August 30, 1989 it signed an order denying Defendant a statutory right to inspect all books, papers and records of the Association.

On August 10, 1988 Defendant brought a counter claim (TR-15) against the Plain-

tiff alleging selectivity and discrimination in enforcing the deed restriction. In accordance with Rule 166b the Defendant requested production of documents on June 5, 1989, (TR-158). The Plaintiff sought protection under attorney-client and work product privileges (TR-164). Plaintiff's response to Defendant's request for production and upon Defendant's motion to compel production. Judge Smith conducted an "in camera" inspection and on August 30, 1989 signed an order (TR-207) denying discovery of some documents. The court's ruling is in error. The Defendant is a member of the Boudreaux Civic Association and has a statutory right to inspect the records of the Association as set out in (TR-593) Article XV of the bylaws of the Boudreaux Civic Association which states that "the books, records and papers of the corporation shall at all times, during

reasonable business hours, be subject to inspection by any member." Texas Non-Profit Corporation Act Article 1396.2. 2-3(b) (TR-592) provides that "all books and records of a corporation may be inspected by any member...." As a matter of law the Plaintiff is not entitled to such an exclusion when the material sought in relation to the activity of Boudreaux Civic Association is a statutory right. Additionally no document is protected from discovery when the purpose of such is in support and the determination of allegations of misconduct on the part of officers and board members. Texas Society v. Fort Bend Chapter, 590 SW2d, 156, (Tex-.Civ.App.-1979) ref. n.r.e. All the records of the Association, including those in the possession of their attorney, Mr. Dillon, which in any way relates to his representation of Boudreaux Civic Associa-

tion are open for inspection by any member. Fort Worth KJIM v. Walke 604 SW2d, 362 (Tex.Civ.App.-1980).

As a result of Judge Smith's order the Defendant's stated right has been infringed and further impair his ability to defend this suit and adequately pursue his counter claims. Such denial amounts to a clear abuse of discretion. This cause was transferred to the 80th District Court and a motion was presented to Judge Powell on November 3, 1989. Defendant's motion for a review of documents ruled privileged by Judge Smith (TR-425). The motion was denied on November 17, 1989. By such denial the court has allowed the Association, its officers and director to perpetrate inequity and injustice behind the corporate form; Gentry v. Credit Plan Corp. of Houston 528 SW2d 575 (Texas-1975) and destroy the timely effect of Defendant's

discovery.

POINT OF ERROR V - RESTATED:

The 61st trial court abused its discretion when on September 8, 1989 it granted Plaintiff's motion to recuse Judge Smith which was filed three days before a scheduled hearing; contrary to Rule 18(a) of T.R.C.P.

Boudreaux Civic Association filed a motion on September 5, 1989 to recuse Judge Smith (TR-286) and failed to meet the mandatory filing requirements in its untimely presentation of their motion. The Texas Rules of Civil Procedure Rule 18(a) provides that...."at least ten days before the date set for a trial or other hearing.... any party may file....a motion....stating grounds why the judge before whom a case is pending should not sit in the case." The Association's motion was filed September 5, 1989, three

days before the Defendant's scheduled hearing, on September 8, 1989; Defendant's motion to extend discovery and to compel production on prescribed schedule (TR-284) of which they were notified August 31, 1989. The law is very well established and Plaintiff's motion should have been denied Limon v. State 632 SW2d 812 815 (Civ.App. Houston 1982); Autry v. Autry 646 SW2d 586
(Civ.App. Tyler 1983); Gonzales v. Gonzales 659 SW2d 900 (Civ.App. El Paso 1983). The rule states that judges shall recuse himself or refer the motion when such a motion is properly filed, meaning at least ten days before a trial or other hearing. Nothing in the rule authorizes the judge to recuse himself if the motion is untimely. In Limon v. State the court found no error in the judge's denial of a motion to recuse which was urged less than the re-

quired ten days before a hearing. A similar holding appears in Gonzales v. Gonzales. So far there appears no authority supporting Judge Smith's order to recuse himself. And his action constitutes an abuse of discretion. Further, the Association failed to state any grounds. legal or constitutional, as the basis for their motion. Or to present any substantive fact that would precipitate partiality or impropriety as Plaintiff's motion implied. Neither of personal bias, prejudice concerning subject matter or party or personal knowledge of the facts in contention are stated in Plaintiff's motion. But that there exists a "high probability" of the calling of Don Sheldon Smith to testify as a witness before his father. Don Smith is not a representing attorney, or party to this suit. Winston v. Masterson 27 SW 768 (Tex.-1984). He has no personal knowledge of the facts before the 61st

Court, and could only relate information reported to him in 1983 by Boudreaux Civic Association in his capacity as their attorney in a closed and separate suit. Under Rule #602 and 802 of the Texas Rules of Civil Evidence Don Smith could not testify in this cause. The matter of consanguinity, if considered, is irrelevant since such grounds are directed only to "parties" not witnesses. The immediate argument is presented in search of some overriding factor to justify Judge Smith's recusal of himself upon the filing of an untimely motion to recuse, void of any mandatory allegation or adequate fact statement upon which to support such recusal. Again, the court's action exceeds its authority and has worked delay and injustice to the Defendant. See Cline v. Niblo. The court's ruling is therefore in error.

POINT OF ERROR VI - RESTATED:

The 80th trial court abused its discretion when on November 11, 1989 it denied Defendant's motion for sanction for Plaintiff's untimely and delaying motion to recuse Judge Smith contrary to the provisions of Rule 18a (h) of Texas Rules of Civil Procedure.

On October 19, 1989 Defendant and Appellant presented a motion (TR-337) to the 80th Court for sanctions against the Plaintiff for the untimely and delaying motion presented, without sufficient cause, to 61st court. Rule 18a(h) provides that the judge to whom the case is assigned may, upon the Defendant's motion and in the interest of justice, authorize sanction under Rule 215 2(b). As set out in Defendant's motion for sanctions and outlined in Points of Error #V, the Plaintiff's motion was untimely, without good

cause, and solely for the purpose of delay and to upset the court's agenda. The Plaintiff was scheduled for a second hearing on September 8, 1989 on their failure to comply with Judge Smith's order of July 21, 1989 compelling production of books and records, and for an extension of the discovery period which was necessitated by the Association's refusal to produce the records for inspection in light that a Docket Control Order (TR-169) was signed June 29, 1989. Rather than face a second order to produce and face sanctions for failure to produce the Association filed an untimely motion for purposes of delay. Judge Powell having jurisdiction, the records and a motion for sanction denied the request of Defendant which is an abuse of discretion. The record clearly indicates a lack of sufficient cause and purpose for delay. And Defendant's motion

should have been granted. This Court of Appeals has the duty and authority to render a proper order as justice would determine. Scott v. Liebman 404 SW2d 288 (Texas 1966). Upon reversal of this cause Defendant should be awarded sanctions of $500.00 as should have been done by the trial court.

POINT OF ERROR VII - RESTATED:

On November 17, 1989 the trial court 80th District granted Plaintiff's motion for partial summary judgement, when there existed genuine issues of material facts that should have precluded such a ruling, contrary to T.R.C.P. #166(a).

On October 23, 1989 Plaintiff filed a motion seeking partial summary judgement (TR-371) on issues raised in Defendant's counter claims (TR-374). In their motion the Association allege that Appellant's counter claims were barred under theory of

res judicata, collateral estoppel, and statute of limitation. In his response November 9, 1989 (TR-434) and motion for rehearing on December 15, 1989 (TR-486) the Defendant stated that a cause of action may only be barred if that cause was previously adjudicated on the merits and there exist in the current suit all of the following: an identity of parties, issues, subject matter, relief sought and cause of action as to matters raised or could have been raised. Franklin v. Rainey 556 SW2d 583 (Civ.App.-Dallas 1977). Except for the parties all other factors are dissimilar. Further no issue of Defendant's counter claims were raised or could have been raised in the prior suit until there were facts and tangible proof of such probative value to support a cause of action. A cause of action comprises both the existence of a right and facts suffi-

cient to constitute a claim for relief. Linken Hoger v. American Fidelity 260 SW2d, 884,886 (Texas Supreme-1953) quoting Williams v. Pure Oil Company 78 SW2d 929,931 (Court of Appeals-1935). The Defendant in his counter suit claims selectivity and discrimination and introduced documentary evidence subsequent to 1983 supporting such claims. The Plaintiff's 1983 suit was directed to the use of an out-building, their 1988 suit was directed to cars on Defendant's property. Therefore, the trial court was obligated to ascertain whether there existed genuine issues as to any material fact of identity of issue, subject matter, relief sought and cause of action. And whether the supporting document dated June 27, 1985 forming the basis of Defendant's counter suit could support a cause of action in 1983, prior to its creation. A judgement

is res judicata only of the present facts and condition at the time of judgement and cannot hold as to future condition or matter raised subsequent to judgement. Cowling v. Colligan 312 SW2d, 943 (Texas 1958). The granting of a summary judgement on the principle of res judicata is an error by the trial court.

Plaintiff's proof for partial summary fails to show that any issue in Defendant's counterclaim were fully and fairly litigated in the prior 1983 suit. In the absence of identical issues collateral estoppel will not hold as a bar to Defendant's counterclaims. Valley International Properties, Inc. v. Brownsville Savings & Loan Association 581 S.W.2d 222, 226 (Civ.App.-Corpus Christi-1979).

"Insofar as collateral estoppel might apply to the instant suit the general rule is that collateral estoppel also operates

to prevent a question of law or an issue of fact which has once been litigated and adjudicated in a court of competent jurisdiction from being relitigated in a subsequent suit between the same parties...." Olivares v. Broadway Hardware, Inc. 564 S.W.2d, 195,198 (Civ.App.- Corpus Christi - 1978) ref. n.r.e.

A similar holding is made in Watson v.Wisehart 258 SW2d, 350 (Civ.App.-Galveston-1953) (in part).

"We have examined....the other three suits involving enforcement of the restriction in the addition....of these two were dismissed. The other suit did not involve enforcement of a restriction against the use of property in the addition for business purposes. Certainly it was not held in the (prior) suit that the restriction had been canceled or terminated (the issue now before the court)...said

(prior) suits were neither res judicata...nor did the judgement work any estoppel by judgement."

The law is clear and well established as outlined above and the Plaintiff has made no showing of proof consistent with law that could entitle them to a partial summary judgement on the basis of collateral estoppel. No issue of Defendant's counter suit could have been or was adjudicated in 1983 and the trial court's ruling is in error. The Plaintiff's allegation that Defendant's counterclaims are barred under statute of limitation is not applicable. Rule 97 of Texas Rules of Civil Procedure and Article 16-069 of Texas Civil Practice & Remedies Code provides that a party to an action may file a counterclaim even though as a separate action it would be barred by limitation if such counterclaim arose out of the same

transaction or occurrence. The Plaintiff's 1983 suit involved deed restriction enforcement. The Plaintiff's 1988 suit addressed deed restriction enforcement. The Defendant's counterclaims allege selectivity and discrimination in the enforcement of deed restriction arising out of the Plaintiff's 1983 and 1988 suits and are therefore valid counterclaims arising out of the same transaction unaffected by statute of limitation. The duration between transactions are not stated in the statute, but is generally interpreted to be flexible and "may comprehend a series of many occurrences depending not so much upon the immediateness of their occurrence but upon their logical relationship." Moore v. New York Cotton Exchange, 270 U.S. 610, 46 S. Ct. 361 (1926). Further the Association signed a document (TR-23) June 27, 1985 granting the identical priv-

ilege to another which they deny Defendant by their 1983 law suit and by the signing of that document matured Defendant's counterclaims when he became aware of it in March 1987. Negating Plaintiff's claims to a bar by the statute of limitation. To further negate such claims the discovery rule states that a statute of limitation barring an action runs from the date the nature of the injury was discovered and not from the date the act occurred giving rise to the injury. Hays v. Hall 488 S.W.2d, 412 (Texas-1972). To be entitled to summary judgement the burden is upon the Association as movant to negate the pleading of such rule by proving that there is no genuine issue of fact concerning the maturity of Defendant's claims. Zale Corp. v. Rosenbaum 520 SW2d, 899 (Texas-1975). No such proof was presented by the Association. The fact and law

indicate that the trial court's ruling granting partial summary judgement was in error. Additionally in deciding whether or not there exist issues of material facts precluding summary judgement, evidence favorable to the non-movant should be taken as true and every inference must be indulged in favor of the non-movant. Gibbs v. General Motors Corp. 450 S.W.2d, 827 (Texas- 1970). The Association was not entitled to partial summary judgement as there existed genuine issues of material fact as to whether Defendant's counterclaims were barred as to cause of action, issue, relief or subject matter raised earlier and whether the statute of limitation will hold as a bar over the discovery rule. Or whether, in fact, any issue was or could have been raised in the 1983 suit.

POINT OF ERROR VIII - RESTATED:

The 80th trial court abused is dis-

cretion when it signed an order striking Defendant's pleading and granted default judgement without just cause as required by Rule 215 of Texas Rules of Civil Procedure.

On December 15, 1989 the Association filed a third motion for sanction (TR-525) alleging that the Defendant abused the discovery process by failing to allow inspection of property, by seeking to inspect the books and records of the Association and failing to appear for deposition. In his response (TR-552) and as set out above in Point of Error III, Defendant stated the orders issued ten months earlier by the 61st trial court was void and unenforceable and that the 80th trial court failing to issue any current or valid order was without authority to grant any sanction or default on Plaintiff's allegation of failure to allow inspection

relative to discovery. To do so would be to issue a default judgement on a void and improper order. Further, failing to exceed a void court order and complying to the extent possible, the payment of $200.00 attorneys fee (TR-104) is not an abuse of the discovery process under Rule 215. Points of Error I through III provide adequate support for this argument and is referred here to avoid duplicity.

In their third motion for sanctions the Association complained that the Defendant abused the discovery process by seeking to avail himself of a statutory right under Article XV of the Association's bylaws (TR-523) which states that records may be inspected by any members at any time during normal business hours. On July 21, 1989 Defendant obtained an order compelling the Association to produce its records. Yet the Association failed to

make the records available at any time during normal business hours. August 9, 1989 the Defendant requested inspection and set out a visitation schedule (TR-280) with Brenda Tolleson, president of the Association, only to have them revised (TR-281) without prior consultation with the Defendant. Instead, Mrs. Tolleson selected the time that the books would be available. This is contrary to statutory provisions and implies that the records are unavailable at any other time except as determined by the Association. Further, Mrs. Tolleson sought to make the records of the Association available at the convenience of her husband necessitating a second motion to produce. Defendant's motion to extend discovery (TR-277) and rebuttal to Plaintiff's response (TR-301). Nothing in the action of the Defendant constitutes an abuse of discovery to

any degree. The Association, through Mrs. Tolleson, has abused the discovery process by resisting to produce the books and records. Mrs. Tolleson operates a business from her home where the records are maintained, and is available to present the records for inspection. See answer to Question #20 Interrogatory of Brenda Tolleson. See Texas Society v. Fort Bend Chapter. It is inconceivable that a party may be sanctioned for pursuing a statutory right and no authority has been found to support this. However, the courts have upheld a member's or stockholder's right to inspect corporate records and awarded attorneys fees when enforcing that right. Chavco Investment Co.Inc, v. Pybus 613 SW2d, 806 (Civ.App.-1981) ref. n.r.e. and Fort Worth KJIM v. Walke. The corporate records of Boudreaux Civic Association is not the property of the Tolleson family

and seeking to inspect them is not an abuse of discovery or an act subject to sanctions or default. The Defendant has a clear right to the records during normal business hours, meaning he may select the day to inspect and any time between 9:00 a.m. and 5:00 p.m. Monday through Friday and not at the option of the president. The trial court abused its discretion in ruling that the Defendant abused the discovery process. In fact, the Plaintiff is more deserving of sanction than the Defendant.

The Association further alleges that Defendant abused the discovery process by failing to appear for a deposition. The Defendant frequently makes business and personal trips outside the state of Texas for duration of up to ninety days. On September 17, 1989 Defendant left Houston for a three-week visit to Florida and

later learned that on the 25th of September counsel for Plaintiff had sent some correspondence. These letters were received on Monday, September 25, 1989 by an acquaintance. (TR-Supplemental Transcript). The letters requested an appearance for deposition September 28, 1989. The Defendant returned Wednesday, September 27, 1989 and reviewed the request for items to be produced at the deposition the next day. Many of these were not readily available and Defendant was not prepared for deposition or able to retain counsel on such short notice. The Defendant advised Plaintiff's counsel by letter on September 27, 1989 (TR-598) that he could not appear because of the late notice. This was acknowledged September 28, 1989 (TR-Supplemental Transcript). No further request was made. On December 15, 1989 the Plaintiff submitted its third motion

for sanction complaining that the Defendant had abused discovery by failing to appear for deposition. There was ample time, two and one half months to reschedule another deposition if Plaintiff considered one paramount. But chose instead to litigate this suit on sanctions rather than merits of fact and law. Defendant's failure to attend was co-incidental due to his absence from Houston. A response was made on his late return. This is not an abuse of discovery. Similar cases have been treated more appropriately than the granting of a default judgement. There was no refusal or disregard to be deposed. All other cases where there has been a default for failure to appear, the events are demonstratively different. Several attempts to depose were refused, no response to notices were made, Wiley v. Browning 670 SW2d 729 (Tex. App.-Tyler,

1984); also Ida E. Downey v. Aquamarine 701 SW2d 238 (Texas, 1985), agreements were made then rescinded. The facts situation are undeserving of sanctions in the case at hand, contrary to the treatment of a default judgement other courts have held that such penalty should not go to the extent as to relieve the Plaintiff of the burden of proving the alleged matter of their claims. Snowden v. Republic Supply Co. 239 SW2d 201 (Civ.App. Dallas, 1951) ref. n.r.e. A similar holding appears in Rodenbaugh v. Beachum 576 SW2d 143 (Civ. App. - Waco, 1978) ref. n.r.e. The sole consideration of the lateness of the notice would make the granting of sanction improper. In Brohmfalk v. Linwood 742 SW2d 518 at 520 (Civ.App.-Dallas, 1987) the court held that four days notice was scant to appear for a deposition. More so if the party is out of the state

at the time. Three days is therefore inadequate and sanctions on such late notice is improper. The trial court abused its discretion in granting a default judgement. In both Rodenbaugh and Snowden it was held that the trial court abused its discretion in imposing sanction because there was no evidence that appellants wilfully refused to be deposed. This was the first and only request for deposition of Defendant and the trial court's action is unreasonable and arbitrary.

In Slavin v. Plano Savings & Loan Association 711 SW2d 281 (Tex.App.-1986) ref. n.r.e., the Court of Appeals held that the trial court abused its discretion in striking Appellant's claims and granting default judgement against him based upon his failure to appear for deposition which was noticed and subsequently re-

scheduled. The court held that "only the most aggravating of circumstances warrants (the ultimate sanction) granting a default judgement for abuse of discovery process." There was never an aggravating circumstance in this case. The Defendant was notified while out of the state, drove in the day before the scheduled deposition and without time to collect requested documents and retain counsel. He notified Plaintiff's counsel that he was unable to appear because of the late notice. In this situation a default is not warranted. After the Defendant's pleading was struck, a court ordered deposition was rescheduled for January 11, 1990. Thus giving the Defendant adequate time to prepare and retain counsel for a proper appearance. The court action is therefore unjustified and demonstrates an abuse of discretion.

POINT OF ERROR IX - RESTATED:

The trial court abused its discretion by failing to recuse Judge Powell on the basis of personal bias and prejudice concerning a party.

On February 9, 1990, Defendant filed a motion (TR-691) to recuse Judge Powell from sitting before this cause. A hearing was held before a visiting judge, Judge Putnam Reiter, on February 26, 1990 (TR-802) which was denied. On November 17 and 20, 1989 Defendant appeared before Judge Powell when it became apparent that Judge Powell had become accustomed to attorneys representing litigants and had developed a personal bias and prejudice concerning a party representing himself. To the degree the Defendant felt that so pervasive a disposition would reasonably impair Judge Powell's ability to exercise a fair and impartial trial. On November 17, 1989 his

statement that Defendant "go get an attorney or lose your house" was evidence of a bias. Three days later on November 20, 1989 Judge Powell's statement, "I am not about to waste my time or anyone else's time," was demonstratively one of disdain. His further statement that the Defendant is "playing games" further reinforces the presence of a bias and prejudice towards parties representing themselves. Not once, but twice, three days apart did the judge express his bias as an ultimatum contrary to law. Rule #7 Texas Rules of Civil Procedure, directing a party to be represented by an attorney abridges that party's right to represent himself. Ex Parte Shaffer 649 SW2d, 300 (Texas, 1983). The standard for determining whether a judge should recuse himself is whether a reasonable person knowing all the facts would conclude that his impartiality might

reasonably be questioned. Not only is such a statement prejudicial, it implies a foregone conclusion without proper judicial examination. Norton v. State 755 SW2d 522 (Texas App., 1988). Judge Reiter, a visiting judge, abused his discretion in denying Defendant's motion. The hearing was a mere ritual. The court reporter of Judge Powell's court was not on duty and usually not on duty at these hearings such as to allow proper documentation of these statements by the judge. Only a moron would expect Mr. Dillon or any party of the Association to admit that the judge was prejudiced or made any statement implying such. On every occasion the judge ruled in favor of the Association. The impropriety is blatant in his order granting partial summary judgement on November 17, 1989 and his order granting sanction January 5, 1990.

This Court of Appeals has a duty and the authority to scrutinize the ruling of the trial court, Aldridge v. State 342 SW2d 104 (Crt. App. 1961), and to correct and compensate such injustice. The entire record should be reviewed as this case is tainted with improprieties and irregularities and laments some justice as set out in Defendant's reply to Plaintiff's response to Defendant's motion for recusal (TR-719).

POINT OF ERROR X - RESTATED:

On March 30, 1990 the trial court signed a final judgement granting a permanent injunction and awarding attorneys fees in favor of Plaintiff without any evidence or proof of damages to support such judgement. And thereby abused its discretion.

It is fundamental that no injunction be issued by any court unless evidence

supporting same is produced and heard. The party seeking an injunction must plead facts which would entitle him to injunctive relief and offer evidence which would prove current or imminent damage. Sun Oil Company v. Whitaker 424 SW2d 216 (Texas-1968). The Plaintiff's petition fails to state any fact that if it were proved true would constitute a violation of the deed restriction entitling them to relief. The deed restriction (TR-10) prohibits inoperable cars in the subdivision. The Association identifies Defendant's cars and by statement only attributed an inoperable condition. No measure of test has been produced or demonstrated, neither has the Association presented the basis for their determination. Only one condition, namely, inoperability, if proven, would entitle the Association to injunctive relief. Neither infrequent use or unlicensed con-

ditions are prohibited by the deed restriction, neither so of any make, model, color or year designation is prohibited. Neither is the appearance of a car prohibitive or in any way definitive of inoperable for purpose of injunctive relief. See Statement of Facts page 20, line 12. Question by Leary Cox (Defendant), "How did you determine those cars to be inoperable?" Answer by Mrs. Tolleson (Line 13-22) "Well, the general appearance and whether or not they are registered and licensed and are street worthy by the State of Texas... then it is assumed to be inoperable." It is apparent that this action was brought on the basis of an assumption. Mrs. Tolleson's testimony further supports this point of view, Statement of Facts, page 31 lines 17-24. Question by Leary Cox, "When you made an inspection of the cars on my property,

where were they located?" Answer by Mrs. Tolleson, "I did not inspect the cars on your property, Mr. Cox. I am not a mechanic. I am not capable of inspecting the cars." The record establishes that the Association is without right to an injunction because it fails to prove an inoperable condition of Defendant's cars that would entitle them to relief. The Supreme Court has held that, "Writs of injunction should not issue on mere surmise" but that applicant has the burden of offering some evidence which establishes a probable right to recovery. Millwright Local Union #2484 v. Rust Engineering Co. 433 SW2d 683 (at 687) (Texas 1968). The trial court erred in its ruling granting the Association a permanent injunction without a showing of actual or imminent damage. Mother and Unborn Baby Care of North Texas, 689 SW2d 336 (Civ.App. Fort Worth-1985) writ dismissed. A probable injury

may not be speculative or conjectural or based upon fear, assumption or apprehension. The facts and the trial court's ruling are in conflict and it has abused its discretion. If the evidence shows no intention in fact or the existence of a violation on the part of the Defendant in support of the Association's petition, the injunction should have been denied.

POINT OF ERROR XI - RESTATED:

On March 30, 1990 the trial court signed a final judgement awarding attorneys fees to Plaintiff when such an award is not authorized except in conjunction with an award of damages. And by doing so the court abused its discretion.

It is well established that attorney fees are not recoverable in an action except provided for by statute or agreement New Amsterdam Gas Co. v. Texas Industries, Inc. 414 SW2d 914 (Texas-1967).

City of Dallas v. Arnett 762 SW2d 942 (Civ.App.-1988).

On March 30, 1990 the trial court granted the Association attorney fees in the absence of any evidence supporting a contractual agreement or statutory provisions. Further the granting of attorneys fee is dependent upon whether the Association has proven a valid claim upon which the court's judgements can stand. Jaylor Textiles v. Pacific Compress Warehouse 547 SW2d 738 (Civ.App.-1977) ref n.r.e. as set out in Point of Error X the Association failed to prove a right to recover damages. The trial court specifically denied any civil damages (see Finding of Fact #7) (TR-778), consequently there should be no award of attorneys fee. The same holds true for exemplary damages. The Supreme Court has stated that where no actual damage is shown, there can be no recovery.

Flanagan v.Womack 54 Texas. 45, Trawick v. Martin Brown Co. 79 Texas 460, 14 SW2d, 823. It follows therefore that the Association is not entitled to any recovery, exemplary award or attorneys fees. Because the issue of a permanent injunction is improper and the Plaintiff was denied civil damages the award of attorneys fees is an abuse of discretion. The court did not find a breach of the restrictive covenant.

POINT OF ERROR XII - RESTATED:

The trial court's Finding of Fact is contrary to facts set out in the record and otherwise no evidence in the record to support such findings.

The trial court's statement in Finding of Facts #1 (TR-776) stating that Leary Cox engaged in discovery abuse by failing to allow Plaintiff to conduct a mechanical inspection of two vehicles is

not supported in the record. Initially the Plaintiff failed to submit a proper request and has presented no evidence that they did. The Plaintiff's visited Defendant's property and made their inspection as ordered on January 20, 1989 and March 30, 1989. See the affidavit of Ashna Campbell (TR-753) and affidavits of Brenda Tolleson (TR-73 & TR-74). At no time was the Association denied opportunity to their inspection. What, therefore, is the nature of the abuse? Plaintiff's Exhibits 2-8, photographs were taken by the Plaintiff on January 20, 1989 in Defendant's back yard. Exhibit P-5 shows Mr. Dillon standing to the left rear of the vehicle on Defendant's property conducting his inspection. See Statement of Fact page 7 lines 17 through 25 and page 8 lines 1 through 5.

Finding of Facts #2 states that De-

fendant violated two court orders commanding a mechanical inspection. No order issued in this suit refers to a mechanical inspection and the Plaintiff has failed to identify or produce any such order. The 61st Court issued an order authorizing one inspection on January 20, 1989 and another on March 31, 1989 (TR-66) and (TR-114). A mechanical inspection was never requested or granted in this cause.

Finding of Facts #3 is without substance. As a member of the Boudreaux Civic Association, Leary Cox has statutory right to inspect the books, records and papers of the Association at any time during normal business hours as set out in Article XV of the bylaws of the Association (TR-523) and as provided under Texas Non-Profit Corporation Act Article 1396.223 (TR-524). The court has again failed to state the nature of the abuse.

When a party satisfies a statutory right there is no abuse of discovery in doing so.

The trial court has made no ruling to the effect that any motion or response filed by the Defendant is frivolous nor has the court named any such motion or response. Such a finding is absurd. Motions and responses are the vehicles used to bring issues before the court. As set out in Rule 13 T.R.C.P courts shall presume that pleadings, motions and other papers are filed in good faith. No sanction shall be imposed except for good cause the particulars of which MUST be stated in the sanction order. The Defendant is unable tc find any particulars in any order supporting Finding of Fact #4. This is contrary to the facts in the record.

Failing to appear for a deposition upon three days notice is not an abuse of discovery. The required standard time is ten (10) days and the court's finding is improper as set out in Point of Error VIII and incorporated here by reference.

The record demonstrates that Findings of Fact #6 is not supported by items 1 through 5. Neither individually or collectively do they constitute good cause for a default judgement, but represents an arbitrary and capricious ruling by the trial court and wanton disregard for justice, as detailed in Points of Error I through X and incorporated here by reference.

The court's finding of Fact #7 is proper.

However Finding of Fact #8 is contrary to evidence in the record. The Defendant testified that his vehicles are

operable and the Plaintiff has not proven otherwise. See Statement of Facts page 65 lines 1 through 4.

There was no violation of the deed restriction and therefore nothing to abate. See Statement of Fact page 51 lines 20-22.

Finding of Fact #9 is not supported by the record. No evidence exists that indicates a violation. Point of Error X has outlined the impropriety of the issuing of a permanent injunction and is incorporated here by reference.

As a general rule attorneys fees are not recoverable in prosecuting a suit except provided by law or contract. In the absence of any breach of the restrictive covenant award of attorneys fee is improper. Freedman v. Briarcroft Property Owners 776 SW2d, 212 (Civ.App. 1989).

POINT OF ERROR XIII - RESTATED:

The trial court's conclusions of law are misplaced under the facts set out in this cause and constitute an abuse of discretion.

The trial court is authorized under Rule 215 of T.R.C.P to impose sanction under specific conditions and is limited to such sanctions that are "just" and only when a failure to comply with discovery rules has occurred and some harm has been caused to the Plaintiff. And that failure to comply is willful and protracted. The trial court's conclusion of law No. 1 fails to elucidate the intent or the practice of Rule 215, and throughout this case has exceeded the limits of discretion authorized by this rule. Ray v. Beene 721 SW2d, 876 (Tex.App.-1986-ref.n.r.e.). No element of the court's order of January 5, 1990 is just when unauthorized. Neither

is conclusion of law #2 granting a permanent injunction in the absence of existing or imminent damage to the status quo. Such an injunction effectively alters the status quo rather than restores it, when no violation has been found. The facts establish no basis for a permanent injunction. No recovery to Plaintiff is authorized by any statute or contract except the Plaintiff has pleaded and proven entitlement to such recovery of cost or attorneys fee. Which they have failed to do. Statement of Facts page 22 lines 10 through 25. Mrs. Tolleson's testimony states that the Defendant's cars were not offensive or inoperable. Question by Leary Cox, "Do you consider these (Plaintiff's Exhibits 5 & 6) to be offensive relative to paragraph 6?" Answer by Mrs. Tolleson, "No."

Question by Leary Cox, "Do you consider them inoperable?" Answer by Mrs.

Tolleson, "I said the assumption is that they are inoperable if they are not licensed or inspected in the State of Texas...."

Question by Leary Cox, "Is there any damage to the appearance of those cars?"

Answer by Mrs. Tolleson, "There is no question about the appearance."

The court's ruling is also in favor of the Defendant. See Statement of Facts page 68, lines 3 through 8.

The Court: "Mr. Dillon, I am going to stand by my ruling, but I will tell you and the Civic Association, too, that I think the term "inoperable automobile" was not proved. And it also means a mechanical condition not an unlicensed condition." A permanent injunction may not be issued on an assumption. This action was therefore not based upon a, or any, breach of the restrictive covenant as the facts

above indicate. It follows that the award of attorneys fees and cost is improper under Section 5.006 of the Texas Property Code. Townplace Homeowners Association, Inc. v. McMAHON 594 SW2d, 172 (Civ. App.-1980) ref.n.r.e.

Neither the deed restriction relevant to this action or Texas Rules of Civil Procedure provides for award of attorney fees or cost based upon the assumption of a breach of a restriction. The court has produced no such provision.

* * * *

No. 01-90-00657 CV

LEARY COX, Appellant	§	In the Court of Appeals
	§	First Judicial District
V.		
BOUDREAUX CIVIC ASSOCIATION, INC., et al	§ §	For State of Texas

Appellant's Motion for Rehearing

To the Honorable Court of Appeals:

Now comes Leary Cox, Appellant in the above styled and numbered appeal and move this Court to set aside its judgement of March 14, 1991, against Appellant, affirming the trial court's judgement and to grant Appellant a rehearing on all issues set forth herein. On March 29, 1991, Appellant requested an extension of time to file his motion for rehearing and by order of the Court dated April 4, 1991, Appellant was granted an extension to April 15, 1991 to file his motion for a rehearing and in support Appellant makes the following assignments of error.

ASSIGNMENTS OF ERROR

1(a)

The Court of Appeals erred in overruling appellants first and second points of error by concluding that the records on appeal were incomplete without evidence to support its conclusion.

1(b)

The Court of Appeals erred when it overruled appellant's first and second points of error, when it considered by presumption exhibits which were not part of and could not be part of the record on appeal by virtue of fact that said Exhibits were not part of the trial court's records.

1(c)

The Court of Appeals erred in its opinion that appellant is under burden to present exhibits as part of records on appeal when such exhibits were not submitted or admitted into evidence or formed any part of the trial court's records.

2

The Court of Appeals erred in overruling appellant's first and second points of error on the basis that insufficient record was brought forward to show reversible error when the record shows other-

wise.

3

The Court of Appeals erred in its interpretation of the trial court's orders of January 16, 1989, and February 27, 1989, and is in error by overruling appellant's third point of error.

4

The Court of Appeals has misplaced the law regarding non-profit corporations and a commercial for-profit corporation in overruling appellant's point of error number four.

5

The Court of Appeals has erred in overruling appellant's fifth point of error and has misplaced the fact that Judge Smith recused himself on an untimely motion to recuse and such order is reviewable on appeal.

6

The Court of Appeals erred in overruling appellant's sixth point of error by misplacing the law and concluding that Judge Smith's order is not reviewable and sanctions cannot be granted.

7

The Court of Appeals erred by misplacing the facts and the law when it overruled appellant's seventh point of error on the premise that he could have raised his counterclaims in the 1983 suit, when such claims matured in 1985.

8

The Court of Appeals erred in overruling appellant's eighth and third points of error by misrepresenting the facts stated in record and a misapplication of the law.

9

The Court of Appeals erred in overruling appellant's ninth point of error by mis-

statement of the fact and misapplication of the law requiring a judge to recuse himself on personal bias.

10

The Court of Appeals erred in affirming a permanent injunction by the trial court when there exists no proof of evidence of damage or violation of deed restriction as set out in appellant's tenth point of error.

11

The Court of Appeals erred when it affirmed the trial court's granting of attorneys fees when such award is not authorized except in conjunction with an award of damages and the violation of a deed restriction.

12

The Court of Appeals erred in affirming the trial court's findings of fact when there is no evidence or insufficient evi-

dence to support such findings and the facts and the law are contrary to the court's finding as set out in appellant's point of error except for finding of fact No. 7.

13

The Court of Appeals erred in overruling appellant's thirteenth point of error when the trial court's conclusions of law are misplaced and not supported by the fact as appearing in the record.

Assignment of Error #1(a)

The Court of Appeals erred in overruling appellant's first and second points of error by concluding that the record on appeal was incomplete without evidence to support its conclusion.

In overruling appellant's first and second points of error the court's opinion (page 8) concludes in error that appellant's records were incom-

plete and that the Association had attached exhibits to motion which were proper requests. In fact, no exhibits were attached to the Association's brief and their absence from the record does not render to record incomplete since they were never presented to the trial court. Their absence further preserves the condition at the time the trial court improperly granted sanctions against the appellant. Only records on file before the trial court will become part of the record on appeal. See TXXN, Inc. v. D/FW Steel Company 632 Sw2d, 706 (Civ.App.-1982). Where letters in transcript on appeal were not part of the pleading and were not introduced through any other proceeding leading to default judgement the letters were not part of the record

on appeal and could not be considered by the reviewing court. There is no evidence to show that the letters were exhibits as part of the trial court's record. No exhibits were attached to the Association's motion which makes the record before this court complete now as they were when the trial court made its order. The appellant should not be required to bring records on appeal which were not presented to the lower court. If the Association did attach and file exhibits with its motion, Rule 75(6) T.R.C.P. provides that exhibits tendered and admitted shall remain in the custody of the Clerk of the Court at all times, thus assuring the safety of these documents and they would be part of the record on appeal. It is inconceivable that the Associa-

tion's motion survived the custody of the Clerk of the Court and only the exhibits which were allegedly attached escaped without evidence of their existence as part of the motion. Further, the Association failed to challenge appellant's statement "...that there was no such request in the record,"..."neither was there any request presented to the trial court which could form the basis of an order for sanction." (Page 3, lines 6,7,8 appellant's brief). See State Banking Board v. Valley National Bank 604 Sw2d, 415, 419 (Civ.App.-1980). The Austin court held that, "....exhibit must be admitted into evidence at the hearing....in order to become a part of the record on appeal." There is no evidence of probative force to sup-

port the court's conclusion.

Assignment of Error #1(b)

The Court of Appeals erred when it overruled appellant's first and second points of error when it considered by presumption exhibits which were not part of, and could not be a part of the record on appeal by virtue of fact that said exhibits were not part of the trial court's records.

The Court of Appeals is in error by concluding the exhibits which were no part of the trial court's record to be "....proper discovery request." It is well established law that only exhibits submitted and admitted into evidence at a trial, hearing or other proceeding by the trial court will become part of the record on appeal. The Association neglected to present their exhibits for consideration. Further, the request for discovery

constitutes a prerequisite for the granting of sanction. And except it is proven that the Association's exhibits were attached to the motion and considered by the trial court, the Court of Appeals may not consider them "proper discovery request" because this is a mandatory requirement upon which sanctions are based a mere presumption is inadequate to support sanction of a default judgement. The court elected to consider the alleged exhibits and determine that they were proper request conforming to mandatory provision requiring a statement of reasonable time, place and manner. The court has assumed that the trial court saw the letter but refers to no supporting fact. The court is in error. The court should consider on what is properly before it. "Where

an essential link in the proof of dedication was a map of a subdivision and there was no indication that map was introduced into evidence at trial a copy of the subdivision was not part of the record and could not be considered." · City of Mission v. Popplewell 295 Sw2d, 712 (Texas-1956).

Assignment of Error #1(c)

The Court of Appeals erred in its opinion that the appellant is under burden to present exhibits as part of the record on appeal, when such exhibits were not submitted or admitted as evidence or formed any part of the trial court's records.

In overruling appellant's first and second point of error the Court of Appeals held that under Rule 50(d) of Tex.R.App.P. the appellant is under burden to present sufficient records

to show error and that letters which the Association claims were exhibits but not attached to their motion for consideration by the trial court, were under the duty of appellant to be presented on appeal. As stated before, and hereinafter the Association failed to attach any exhibits to their motion and as such no exhibits were presented to the trial court and therefore appellant was under no duty to bring exhibits that were outside the trial court's records. See Garza v. Levin 769 SW2d, 644 (Civ.App.-1989) "...the appellate court may only consider evidence on file before the trial court at the time of hearing which gave rise to the appealed from order." Rule 50(b) of Tex. R.App.P. is not applicable in instances where documents are not part

of the trial court records.

The appellant has discharged his burden by presenting appropriate and sufficient records, in fact all the records appearing before the trial court in excess of 800 pages. On June 18, 1990, appellant filed a request for transcript (Tr-795) in the Clerk of the Court's office and listed ninety-seven items. Item number seven (#7) lists plaintiff's motion for sanction for failure to allow inspection of property. On July 27, 1990 the Clerk of the Court certified the request (Tr-836) and indexed the Association's motion to be located in the transcript at (Tr 45-46). No exhibits were attached as was the case then and now. Appellant is not and should not be held responsible for their failure to attach

their exhibits to their motion. The absence of which magnifies the impropriety of the trial court's order granting sanction. In reversing a default judgement against a defendant the Court of Appeals, states that "when a reviewing court is called upon to revise ruling of a trial court such reviewing court must do so on record before the trial court when the ruling was made, and a party is not permitted to try a case on appeal on different statements of facts than that presented to the trial court". Grapevine Trucking Inc. v. Shepherd 366 Sw2d, 950 (Civ.App.-Fort Worth-1963) ref. n.r.e.

Assignment of Error #2

The Court of Appeals erred in overruling appellant's first and second points of error on the basis that insufficient re-

cord was brought forward to show error, when the record shows otherwise.

In reviewing appellant's first and second points of error the court refers to the Association's letters to appellant that it asserted were request for inspection and that these letters were attached as exhibits to the Association's motion. Also that the appellant had failed to bring these letters purporting to be "request" as part of the record for review. There were no exhibits attached to the Association's motion although the letters were described and designated as exhibits within the body of appellee's motion, none was attached to it or presented to the trial court. The appellant stated this on page 3 of his brief addressing his first point of error. See

appellant's brief (p-3).

So far the appellant has brought a complete and sufficient record to show error. As set out below. The appellant requested plaintiff motion for sanction for failure to allow inspection of property as item No. 7 appearing at (TR-795). The Clerk of the Court's certificate of delivery (TR-836) identifies it at (TR-45) and as stated in his brief, it contains no exhibits or letters or request for inspection. The trial court none-the-less granted sanction from which this appeal originates. The Court of Appeals is in error in concluding that the record before it is incomplete to show reversible error and that it must engage every reasonable presumption to be in favor of the trial court's ruling. The

Association's motion (TR-45) contains enough evidence to sustain appellant's points of error. In the absence of appellee exhibits their motion should be reviewed. The court has failed to take note that the Association affirmatively declared in their motion (TR-45) the content and nature of the letter of August 18, 1988 designated Exhibit "A" and the other of October 12, 1988 designated as Exhibit "B". In describing the content of Exhibit "A" the Association writes:

"By letter dated August 18, 1988, Plaintiff's counsel requested Defendant Cox to set up convenient times to allow inspection of the cars on the subject property."

A similar request was made in the letter of October 12, 1988 and is supported by the Association's com-

plaint (TR-46) that...

"Despite Plaintiff's repeated request for defendant Cox to set up convenient times....Defendant has failed and refused and still fails and refuses to allow such inspection."

In their brief (page 8) the Association claims both letters constituted the basis of their request but they were never presented to the trial court and no reference is made to any other document. The Association authored (wrote) both the letters and the motion. And in the motion describes the letters with sufficient detail of its content to show that the letters were defective as "proper discovery request" insofar as they requested Appellant (Cox) "...to set up convenient times." There is not a more credible source or a need to

seek another reference. The appellant is under no duty to set up times, determine the place or manner of inspection or obligated to do anything until a proper discovery request is served. The Association's own statement confirms unequivocally appellant's complaint that a proper request was never presented and supports his points of error one and two.

Under Rule 167(1)(c) the requesting party is mandated to submit a request containing all three elements. If that party delegates or imposes any of the required elements to another, as the Association has demonstrated, a proper request has not been executed or submitted by the requesting party. And, if served, is defective and cannot form the basis for sanc-

tion for failure to comply as the Association requested of the trial court. (TR-47)

"Because of Defendant Cox's repeated refusal....sanction should be imposed against Defendant."

The trial court erred when it granted sanctions (TR-66) against the appellant, denied his objection made in Defendant's Response to Plaintiff's Motion for Sanction for Failure to allow Inspection." (TR-57). See Defendant's Response to Plaintiff's Motion for Discovery Inspection (TR-60). With this much evidence on record before the Court of Appeals it should reconsider its opinion that sufficient record was not brought forward, to show reversible error. The record shows that appellant was diligent in bringing sufficient re-

cords for review (TR-795) Item #7 and (TR-45). If the Association's exhibits were attached to their motion they would be part of this record before the Court of Appeals. And their absence clearly attests to the fact that they were not. This Court should also note that the Association failed, in their reply to Appellants points of error one and two, to challenge appellant's statements that (1) the Association's discovery request was void of either a specification of time, place, or manner as required, and (2) that there was no such request in the records meaning no letters or exhibits. (Page 3 Appellant's brief) (3) "...that neither was there any request presented to the trial court." Under Rule 419, Texas Rules of Appellate Procedure:

Any statement made by appellant in his original brief as to the facts or record may be accepted as correct unless challenged by opposing party " J. C.Biscamp v. Zeno Carpet Co. 473 Sw2d, 218 (Civ.App.-Beaumont 1971) also, Bond v. Bond 547 Sw2d, 43, (Civ.App.-Eastland-1977).

There is evidence that the trial court did not see any letters of request as exhibits and there is evidence that letters sent to appellant "as request" are improper by admission in the Association's motion. Further, if the Court of Appeals accepts the Association's statement that their exhibit was attached to the motion, the court should also accept with equal value, their statement that the letters requested appellant to setup times for inspec-

tion, contrary to the mandatory requirement of Rule 167(1)(c). The record is sufficient to show reversible error.

Assignment of Error #3

The Court of Appeals erred in its interpretation of the trial court's order of January 16 and February 27, 1989 and is in error by overruling appellant's third point of error.

The Court of Appeals erred by directing its attention to the meaning of the word "inspection" rather than an investigation into the context and clarity of the order to adequately inform the appellant, without inferences, as to what he is required to do. The meaning of the word inspection is not at issue, the direction or instruction in the order is at issue and is the fundamental com-

plaint in appellant's third point of error. Asserting that the order was improper, void, vague and without foundation. Assume the order (TR-66) was proper for the purpose of awarding sanctions, it could also be void for incompleteness or ambiguity or too vague to be a directive, which would justify a party's failure to comply.

"The court has incorrectly attributed an "absurd" interpretation, by its own definition, to appellant when in fact the appellant made no interpretation at all regarding exterior or interior inspection, unlocking of the cars or presentation of keys; this information is imputed by the court. The order (TR-66) does not contain any of the conditions inferred by the court. By contrast if the order was

properly constructed this interpretation would not be necessary. The court is in error in holding that "....therefore the appellant did violate the first order." (Court of Appeals Opinion - page 9), when such instruction is not in the order. For a party to be held in violation of a court order the order must specify details of compliance in language clear and unambiguous.

The order imposed two conditions, the one being that the appellant pay $200 to Plaintiffs. This is clear and unambiguous instruction requiring no interpretation, and was complied with. The second condition ordered appellant to "allow" the association to inspect cars on his property. The order did not require him to "assist" or be present, neither did it specify

the purpose of the inspection or what conditions should be ascertained; and the absence of such material factors renders the order vague and incomplete to adequately inform the appellant of his obligation beyond providing access to the vehicles and opportunity to inspect. The Texas Supreme Court in a 1967 habeas corpus proceeding laid down the requirements of a valid enforceable order. Ex Parte Slavin 412 Sw2d, 43 (Texas Supreme 1967). "For a person to be held in (contempt) violation of a court decree, the decree must spell out details of compliance in clear, specific and unambiguous terms so that the person will readily know exactly what duties or obligations are imposed on him." Texas decisions hold that an order of the court "...must be defi-

nite, clear and precise as possible and when practicable it should inform the defendant of the acts he is restrained from doing (or obligated to do) without calling on him for inferences or conclusions about which (other) persons might well differ and without leaving anything for further hearing." San Antonio Bar Assn v. Guardian Abstract & Title Co. 291 Sw2d, 697 (Texas Supreme 1956).

The Court of Appeals in its opinion affirming the trial court's second finding of fact stated that "both the first and second orders for sanction instructed the appellant to allow a complete, including a mechanical inspection of the cars." (Opinion page 17). This is simply not so and reference to each order (TR-66) and (TR-114) will show the court to have

misrepresented the content of the orders. Neither did the orders instruct the appellant to provide keys or unlock the cars (Opinion page 9). The appellant should not be sanctioned for failure to do what was not ordered. In Ex Parte Roy A. Lee, 704 SW2d, 15, (Tex 1986) the Supreme Court found that Lee was ordered only to produce documents, not to answer interrogatories and ordered him released on contempt charges. Additionally the Association had the opportunity on February 14, 1989 to revise their order and include a specific demand for a demonstration of operability, but this would be ascertaining a cause of action rather than a search for supporting evidence and would likely alert the court. The Association chose not to modify

the order.

Assignment of Error #4

The Court of Appeals has misplaced the law regarding non-profit corporations and a commercial for-profit corporation in over-ruling appellant's point of error number four.

> Under the provisions of the Texas Non-Profit Corporation Act, Tex. Rev. Civ. Stat. Article 1396.2.23(3) and the bylaws of the Boudreaux Civic Association, Inc. (TR-593) every member has a statutory right to inspect the books and records at any reasonable time. See Texas Society v. Fort Bend Chapter 590 Sw2d, 156 (Civ.App.-1979) ref. n.r.e. also Board of Directors of By the Sea Council v. Sondock et al 644 Sw2d, 774 (Civ.App.-1982) ref. n.r.e. No part of the Association's records are

prohibited from inspection. The court is in error. Texas Business Corporation Act is irrelevant likewise the cases cited by the Court of Appeals. And that such right is undeniable.

Assignment of Error #5

The Court of Appeals has erred in overruling appellant's fifth point of error and has misplaced the fact that Judge Smith recused himself on an untimely motion to recuse and such order is reviewable on appeal.

In overruling appellant's point of error number eight, the court has failed to address the facts as appear in the record. That the Association failed to meet the mandatory filing requirement by filing their motion to recuse Judge Smith (TR-286) on September 5, 1989, less than ten days

before defendant's scheduled hearing of his motion (TR-284) on September 8, 1989 contrary to the provisions of Rule 18(a) of T.R.C.P. The record shows that the Association's motion was legally and factually insufficient to support the motion. But that a probability existed Don Sheldon Smith might be called to testify. Don Smith is not a party or attorney in this case, has no personal knowledge of the facts relevant to the 1983 case or the current case and could only repeat information that was reported to him in his capacity as attorney for Boudreaux Civic Association. Under Rules 602, 802 of Texas Rules of Civil Evidence Don Smith could not testify. The authority cited by the court is factually different District Judges v. Commis-

sioner's Court 677 SW2d, 743 745. An order of recusal is not reviewable if that order was issued by an assigned judge or the presiding judge of the administrative district as in the case of District Judges v. Commissioner's Court. A third judge intervened, heard the motion on merits and disqualified Judge Holland from presiding over proceedings regarding his own orders. The facts are strikingly different and distinguishable. The appellant's complaint is that Judge Smith recused himself contrary to rule when the motion was submitted less than ten (10) days before appellant's motion was to be heard in violation of Rule 18(a) Tex.R.Civ.P. (1989). Because there was no intervening party to review the motion and order, Judge Smith's action is re-

viewable by the Court of Appeals. Further, Judge Smith's action is contrary to Limon v. State 632 SW2d, 812 815 (Civ.App.-1982); Autry v. Autry 646 SW2d, 597 Civ.App.-1983); Gonzales v.Gonzales 659 SW2d, 900 (Civ.App.-1913). Unless a motion to recuse is timely filed the mandatory provision regarding hearing referral and recusal do not come into play. The Court of Appeals is therefore in error.

Assignment of Error #6

The Court of Appeals erred in overruling appellant's sixth point of error by misplacing the law and concluding that Judge Smith's order is not reviewable and sanction cannot be granted.

Judge Smith signed an order recusing himself on an untimely motion by the Association thus bypassing the au-

thority of the assigned judge or the presiding judge to consider the motion and the propriety of the order. His order is therefore reviewed on appeal. Since the Association's motion was untimely and brought for purposes of delay, Rule 18(h)Tex.R. Civ.P.(1989) provides for sanctions as authorized by Rule 215(2)(b). This court now has jurisdiction and the authority to make such ruling as should have been made by the trial court. District Judges v. Commissioners Court is not controlling when the trial judge recuses himself on an untimely motion or on any order which bypasses the administrative judge. Judge Smith's recusal order is located at (TR-327).

Assignment of Error #7

The Court of Appeals erred by misplacing

the facts and the law when it overruled appellant's seventh point of error on the premise that he could have raised his counter claims in the 1983 suits, when such claims matured in 1985.

In 1983 the Association brought suit (TR-2) against appellant prohibiting him from using an outbuilding as a temporary residence. In June 1985 the Association signed a written document (TR-23) granting another property owner permission to use an outbuilding as a temporary residence. The same privilege they denied the appellant by their law suit in 1983. The Court of Appeals is mistaken to conclude that a cause of action which arose in June 1985 could have been presented as a counter claim in 1983 two years before its occurrence. The Texas Supreme Court has held that a

cause of action comprises both the existence of a right and facts sufficient to constitute a claim for relief. Linken Hoger v. American Fidelity 260 SW2d, 884,886 (Tex. 1953). No element of appellant's counter claims could have been raised in 1983. Neither res judicata, collateral estoppel, or statute of limitation is a bar to appellant's counter claims. By March 1987 the appellant became aware that the Association's action was selective as evidenced by the document signed in June 1985 which was presented to the trial court (TR-23 & 24). Under Texas Discovery rule appellant's cause of action accrued when he learned of the document signed in June 1985 and was then able to seek relief. See Weaver v. Witt 516 SW2d, 792, 794, (Tex.

Sup.- 1977) also Bayouth v. Lion Oil Co. 671 SW2d, 867,868 (Tex. Sup.- 1984), Miller v. Dickerson 677 SW2d,253, 257-58 (Civ.App.-1984) ref. n.r.e. The Court of Appeals erred in affirming the judgement of the trial court when there existed genuine issues of material fact which should preclude the granting of summary judgement also the absence of similarity in cause of action, issues, subject or relief sought. And further whether an action may be filed two years before the cause has materialized. The Court of Appeals is in error and should reverse its opinion.

Assignment of Error #8

The Court of Appeals erred in overruling appellant's eighth and third points of error by misrepresenting the facts stated in the record and misapplication of the

law.

In reviewing appellant's points of error eight the Court of Appeals misrepresented the facts and the law as on page 11 and 12 of their opinion. Initially a non-profit corporation does not operate under the Texas Business Corporation Act and as such is not a controlling factor in appellant's request to inspect the Association's books and records. Appellant has a statutory right under Texas Non Profit Corporation Act, Article 1396-:2.23(b) and Article XV of the bylaws of the Boudreaux Civic Association, Inc.. The record before the Court of Appeals shows that (TR-280) appellant agreed to a visitation schedule on August 19, 1989 which was altered August 20, 1989 (TR-281) by Brenda Tolleson without consultation with

appellant. The appellant appeared for inspection on the days and at the times that remained unaltered by Tolleson. The court has failed to identify any law or rule that defines the exercise of a statutory right as harassment or failure to exercise that right as a sanctionable act. See (TR-277) (TR-301). The court has also misrepresented the facts as set out in appellant's brief page 26, and the supplemental transcript (STR-16) and (STR-16-A). The appellant stated that he received notice on September 25, 1989 to appear for a deposition three days later on September 28, 1989. And that he advised the Association's attorney on September 27, 1989 (TR-598) that he could not appear because of the late notice which he acknowledged September 28, 1989 by

return receipt. (Supplemental Transcript page #16-A). Three days notice is not considered reasonable or adequate. The Dallas Court of Appeals considered four days inadequate. Brohmfalk v. Linwood 742 SW2d, 518, at 520. The trial court is authorized to impose sanctions that are just, Rule 215, T.R.O.C.P. The trial court exceeded its authority when it granted sanction without reviewing the mandatory request upon which the sanctions are authorized. No sanctions are authorized for failing to do what was not required in a court order. No sanctions are authorized for exercising a statutory right. No sanctions are authorized for failure to appear for deposition upon three days unreasonable notice. The court has failed to identify or

define which of appellant's motions and responses are frivolous and why they are considered so. The rule requires that courts shall presume that all pleadings and motions and other papers are filed in good faith. The court has instead granted sanctions (TR-549) without good cause and failed to state the particulars in the sanction order regarding the filing of frivolous motions, Rule 13 T.R.C.P. Watkins v. Pearson 795 SW2d, 257,260 (Civ.App.-1990). The Court of Appeals has misplaced the facts and the law in overruling of appellant's third and eighth points of error. The granting of the third order for sanctions and striking appellant's pleading was unauthorized and unjust. The court has failed in its duty to examine the facts as they

appear in the record and apply the proper law.

Rodenbaugh v. Beachum 576 SW2d, 143 (Civ.App.-1978) ref. n.r.e.

Slavin v. Plano Savings & Loan 711 Sw2d, 281 (Civ.App.-1986) ref. n.r.e.

Texas Society v. Fort Bend Chapter 590 SW2d, 156 (Civ. App.-1979) ref. n.r.e.

General Motors v. Lawrence 651 SW2d, 732 (Tex.Sup.-1983)

Ray v. Beene 721 SW2d, 876 (Civ.App.-1986) ref. n.r.e.

Assignment of Error #9

The Court of Appeals erred in overruling appellant's ninth point of error by misstatement of the facts and misapplication of the law requiring judges to recuse themselves on grounds of personal bias.

Under Rule 7 T.R.C.P. any party to a suit may appear and defend his right

in person if he so chooses. Additionally Rule 18 provides that judges shall recuse themselves in proceedings in which they have a personal bias or prejudice concerning the subject matter or a party. The judge made his prejudice and bias unquestionably clear to the degree that appellant concluded that so persuasive a disposition would impair the judge's ability to exercise an impartial trial. The judge's order to "go get an attorney or lose your house" was contrary to appellant's rights and indication of a preconceived outcome of this suit against the appellant. The judge's statement that, "I am not about to waste my time or anyone else's time," demonstrates that the appellant's appearance before Judge Powell was a waste

of his time. Judge Powell holds an elected public office with no authority to select whether he will hear a pro se litigant or an attorney or whether same is a waste of his time. The Texas Supreme Court has upheld a party's right to represent himself. Ex Parte Shaffer 649 SW2d, 300(Tex. Sup.-1983). This court has a duty to examine the ruling, rather scrutinize the ruling of the trial court for improprieties, bias or prejudice rather than conclude that the judge's statements were taken out of context. Aldridge v. State 342 SW2d, 104 (Crt-.App.-1961). The judge's ruling on every occasion was in favor of the Association. See (TR-337), (TR-363), (TR-425), (TR-486), TR-549), (TR-735). The defendant in the trial court filed a motion to recuse (TR-

691) to preserve this complaint, the hearing is located at (TR-802). The judge's statements were made over a three day period and cannot therefore be considered out of context. The Court of Appeals is in error in concluding such.

Assignment of Error #10

The Court of Appeals erred in affirming a permanent injunction by the trial court when there exists no proof or evidence of damage or violation of a deed restriction. As set out in appellant's tenth point of error.

A party seeking injunctive relief must plead and prove entitlement to such by offering proof of current or imminent damage. The Association has failed to prove the inoperable condition they claimed violated the deed restriction. As a result the trial

court denied any civil damages which is consistent with failing to prove ones case. And the granting of a permanent injunction is improper in this case. The Supreme Court has held that writs of injunction should not be issued on mere surmise. Millwright Local Union #2484 v. Rust Engineering Co. 433 Sw2d, 683 at 687, (Tex.Sup.- 1968), also Mother and Unborn Baby Care of North Texas 689 SW2d, 336 (Civ.App.-1985) writ dismissed. The Court of Appeals has overlooked page 68, lines 3 through 8 of the statement of facts. The trial judge stated an inoperable condition was not proved. An injunction should not be granted.

Assignment of Error #11

The Court of Appeals erred when it affirmed the trial court's granting of at-

torney fees when such award is not authorized except in conjunction with an award of damages and the violation of a deed restriction.

The record shows that no violation of the deed restriction, the Association failed to prove their case and denied any damages. See finding of fact #7 (TR-778). As a general rule attorneys fees are not recoverable except where a violation of the restriction is shown. The trial court stated that an inoperable condition was not proven and the award of attorneys fees is improper. Freedman v. Briarcroft Property Owners 776 SW2d, 212 (Civ.App.-1989); also Taylor Textiles v. Pacific Compress Warehouse 575 SW2d, 738 (Civ.App.-1977). Only a breach of a restrictive covenant would entitle the Association to

attorneys fees. The Court of Appeals is in error to affirm such a ruling by the court below. See also Townplace Homeowners Association, Inc. v. McMahon 594 SW2d, 172 (Civ.App.-1980) ref. n.r.e.

Assignment of Error #12

The Court of Appeals erred in affirming the trial court's findings of fact when there is no evidence to support such finding. The facts and the law are contrary to the court's finding as set out in appellant's point of error twelve except for finding of fact #7.

The Court of Appeals failed to state where in the record a mechanical inspection was ordered, neither date, page or line is referred to, but affirms the trial court's finding of fact. Or where any evidence is located confirming that a proper re-

quest was presented to the trial court, forming the basis of order subject to prerequisites. The Court of Appeals in the exercise of its duty is obligated to make an independent and impartial examination of the record and note its finding for comparison with that found by the trial court. If such finding, adequately referenced, coincides with that of the trial court, then the ruling of the trial court should be affirmed. The Court of Appeals has failed to state its own finding supporting that of the trial court. In its first finding of fact the court failed to state what evidence established that appellant prevented the Association from making its inspection.

In affirming the second finding of fact the court has failed to identify

the location of any order in

structing appellant to allow a complete inspection, including a mechanical inspection.

In affirming the third finding of fact the court has failed to identify any rule or law that prohibits a statutory right to inspect the books and records of a non-profit corporation by any of its members.

In affirming the fourth finding of fact the court has failed to identify any motions or responses deemed frivolous by court order in which the particulars of such motion or responses are stated for purposes of sanction in accordance with Rule(s) 13 & 215 T.R.C.P.

In affirming the fifth finding of fact the court has misrepresented the fact that appellant's notice for deposition was untimely and unreason-

able and three days is insufficient notice to be considered a discovery abuse.

In affirming the sixth finding of fact the court has failed to apply the facts on record with applicable law and overrule the trial court findings of facts one through five. No evidence exists to support such findings by the trial court, and do not constitute good or just cause for a default judgement.

In affirming the trial court's eighth finding of fact the court failed to show that appellant did violate the deed restriction, and that there was anything to abate. And by its ninth finding of fact that a permanent injunction was necessary.

Assignment of Error #13

The Court of Appeals erred in overruling

appellant's thirteenth point of error when the trial court's conclusion of law is misplaced and not supported by the facts as they appear in the record.

The court has failed to show that the action of the trial court was just and proper in ordering sanction without the mandatory prerequisites for such order, for granting sanction for one's failure to do what was not ordered by the court and to state what law defines the exercise of a statutory right, harassment or a sanctionable act. The court has not shown any frivolous motions or responses or complied with Rule 13 T.R.C.P. to state the particulars of such motions and response, or show where a three day notice to appear for deposition is considered reasonable and adequate. The court is in

error to find a breach of the deed restriction as the basis for a permanent injunction. The record shows no breach, only that the suit was brought on the basis of an assumption. See Statement of Facts, page 22, lines 10 through 25, page 68, lines 3 through 8. A permanent injunction should not be issued on an assumption. Additionally the court has failed to reverse an award of attorneys fees when no breach of a restriction has been proven. The court's conclusions of law are not supported by the facts in the record and inconsistent with law relevant to those facts.

IN CONSIDERATION of the foregoing assignments, appellant prays that this court will set aside its judgement of March 14, 1991 and reverse the judgement

of the trial court and in all things grant the relief prayed for.

WHEREFORE, this Court of Appeals having the duty and authority as a matter of law to make an render the proper judgement that the trial court should have made and for this and all the reasons set forth above.

(1) Defendant prays that this court will reverse the judgement of the trial court granting a permanent injunction and awarding attorneys fees and cost and render same be dissolved and denied. And that all and total cost be charged against the Plaintiff, Boudreaux Civic Association, Inc.

(2) Defendant prays that the Partial Summary Judgement entered against him on his counter

claims be REVERSED AND REMANDED for trial on its merits.

(3) Defendant prays that this court issues an order mandating the trial court to vacate its protective order and release all documents for inspection by Defendant.

(4) Defendant prays that this court will issue an order directing Boudreaux Civic Association to produce unconditionally its books and records for inspection by Defendant as set out in Article XV of the Association's by-laws. Or in the alternative, direct the trial court to so issue an order.

(5) Defendant prays that this court will issue an order directing Boudreaux Civic Association to

refund $200.00 to Defendant paid to them in compliance with an improper court order. Or in the alternative, direct the trial court to so issue an order. And that same be paid within fifteen (15) days of signing of such order.

(6) Defendant prays that he be granted all of any further relief general and specific, at law or in equity to which he may be justly entitled.

Respectfully submitted,

/s/ Leary Cox

* * * *

CERTIFICATE OF SERVICE

I, Leary Cox, hereby certify that a true and correct copy of the foregoing appellant's motion for rehearing (#01-90-00657) was sent by Certified Mail

return receipt requested to Plaintiff's counsel, Mr. Stephen Dillon, at 7322 Southwest Freeway, Suite #825, Houston, Texas, 77074, on this _____ day of ___ _____ 1991.

/s/Leary Cox

AFFIDAVIT
STATE OF TEXAS §
COUNTY OF HARRIS §

Before me, a Notary Public in and for the State of Texas, on this day personally appeared LEARY COX, of lawful age and qualified in all respects to make this affidavit, who first being sworn on oath say that he is the Movant in this Motion for Rehearing, and that the certificate of service was executed as stated therein, and that he has personal knowledge of all facts and allegations made herein.

_____
Numae L. Blevins
Notary Public in and for the
(Seal) State of Texas
My Commission Expires:_____

* * * *

No. 01-90-00657 CV

LEARY COX, Appellant	§	In the Court of Appeals
v.	§	First Judicial District
BOUDREAUX CIVIC ASSOCIATION, INC., et al	§	For the State of Texas

Appellant's Second Motion for Rehearing

To the Honorable Court of Appeals:

Now comes Leary Cox, Appellant in the above styled and numbered appeal and move this Court to set aside its order of May 2, 1990, overruling Appellant's motion for rehearing and to grant Appellant a second rehearing on all issues set forth herein including Appellant's motion for leave to supplement the Record on Appeal. This motion is filed in conjunction to Appellant's second motion for rehearing and in support thereof, Appellant makes the following assignments of error.

ASSIGNMENTS OF ERROR

1

The Trial Court erred when it failed to dismiss a groundless lawsuit evidenced on the petition as having no basis in fact or law and was answered by special exception.

1(a)

The Court of Appeals erred in overruling appellants first and second points of error by concluding that the records on appeal were incomplete without evidence to support its conclusion.

1(b)

The Court of Appeals erred when it overruled appellant's first and second points of error, when it considered by presumption exhibits which were not part of and could not be part of the record on appeal by virtue of fact that said Exhibits were not part of the trial court's records.

1(c)

The Court of Appeals erred in its opinion that appellant is under burden to present exhibits as part of records on appeal when such exhibits were not submitted or admitted into evidence or formed any part of the trial court's records.

2

The Court of Appeals erred in overruling appellant's first and second points of error on the basis that insufficient record was brought forward to show reversible error when the record shows otherwise.

3

The Court of Appeals erred in its interpretation of the trial court's orders of January 16, 1989, and February 27, 1989, and is in error by overruling appellant's third point of error.

4

The Court of Appeals has misplaced the law regarding non-profit corporations and a commercial for-profit corporation in overruling appellant's point of error number four.

5

The Court of Appeals has erred in overruling appellant's fifth point of error and has misplaced the fact that Judge Smith recused himself on an untimely motion to recuse and such order is reviewable on appeal.

6

The Court of Appeals erred in overruling appellant's sixth point of error by misplacing the law and concluding that Judge Smith's order is not reviewable and sanctions cannot be granted.

7

The Court of Appeals erred by misplacing

the facts and the law when it overruled appellant's seventh point of error on the premise that he could have raised his counterclaims in the 1983 suit, when such claims matured in 1985.

8

The Court of Appeals erred in overruling appellant's eighth and third points of error by misrepresenting the facts stated in record and a misapplication of the law.

9

The Court of Appeals erred in overruling appellant's ninth point of error by misstatement of the fact and misapplication of the law requiring a judge to recuse himself on personal bias.

10

The Court of Appeals erred in affirming a permanent injunction by the trial court when there exists no proof or evidence of damage or violation of deed restriction as

set out in appellant's tenth point of error.

11

The Court of Appeals erred when it affirmed the trial court's granting of attorneys fees when such award is not authorized except in conjunction with an award of damages and the violation of a deed restriction.

12

The Court of Appeals erred in affirming the trial court's findings of fact when there is no evidence or insufficient evidence to support such findings and the facts and the law are contrary to the court's finding as set out in appellant's point of error except for finding of fact No. 7.

13

The Court of Appeals erred in overruling appellant's thirteenth point of error when

the trial court's conclusions of law are misplaced and not supported by the fact as appearing in the record.

14

The Court of Appeals erred when it denied Appellant's timely motion for leave to supplement the record and introduce letters which it said were proper request before the trial court.

15

The Court of Appeals erred by its failure to address a sub point on page 4 of Appellant's brief when it overruled Appellant's Point of Error #1, said sub point addresses the need to prove relevance and materiality in seeking discovery. Wooten v American Motorist Ins. Co. 570 SW2d 572.

Assignment of Error #1

The Trial Court erred when it failed to dismiss a groundless lawsuit with evidence on the petition as having no basis in fact

or law and was answered by special Exception.

On June 24, 1988 the Association filed a suit against Leary Cox, Defendant and Appellant alleging deed restriction violation, specifically that he maintained "inoperable cars" on his property, without any measure of test or verification prior to the filing of this suit. And subsequently failed to submit any probative fact or demonstrative evidence that would support or give evidence to a genuine cause of action. The Plaintiff's petition (TR-2) identifies Appellant's cars by color, make, model year and license plate number and noted that the plates did expire; however, lacks any recital of fact which would give rise to a cause of action or state a claim upon which

relief can be granted. DeLaGarza v Ryals 2d854 (Texas Civ. Appeals, Fort Worth 1951 writ ref'd n.r.e.). In the absence of adequate and sufficient facts or statements that if proven true would justify the allegation, there is no cause of action and none-the-less the Association prosecuted this suit by diverting the attention of the trial court away from the lack of merit in this cause and towards a series of ludicrous and improper sanctions under the discovery provisions of Texas Rules of Civil Procedure (T.R.C.P.). The trial court issued three orders for sanction, all of which are improper, and a default judgement that is fundamentally contrary to the provisions of law. A plaintiff may not sustain a favorable judgement on an unpleaded

cause. Oil Field Haulers Association v. Railroad Commission, 381 SW2d 183, 191 (Tex. 1964).

But the Plaintiff in this case must offer evidence and prove his case as in judgement issued upon trial. Frymire Engineering Co., Inc. v Grantham 524 SW2d 680 (Tex. 1975). The Defendant took special exception in his answer (TR-Supplemental Transcript) to Plaintiff's allegations thus increasing the demand and the burden that such allegations be proven by the Plaintiff. No such proof appeared in the petition or presented at trial. The final judgement entered by the trial court is therefore improper and should be reversed. In order to sustain a default judgement it is essential that the petition show good cause. Griswold v Carlson,

249 SW2d 58, 60 (Tex.). A default judgement must be in accord with the pleadings. Mullen v Roberts, 423 SW2d (576 Tex. 1978). Further, a default judgement not supported by the pleadings is fundamentally erroneous. City of Fort Worth v Gause, 101 SWd 221 (Texas 1937).

Assignment of Error #1(a)

The Court of Appeals erred in overruling appellant's first and second points of error by concluding that the record on appeal was incomplete without evidence to support its conclusion.

In overruling appellant's first and second points of error, the court's opinion (page 8) concludes in error that appellant's records were incomplete and that the Association had attached exhibits to motion which were proper requests. In fact, no

exhibits were attached to the Association's brief and their absence from the record does not render to record incomplete since they were never presented to the trial court. Their absence further preserves the condition at the time the trial court improperly granted sanctions against the appellant. Only records on file before the trial court will become part of the record on appeal. See TXXN, Inc. v. D/FW Steel Company 632 Sw2d, 706 (Civ.App.-1982). Where letters in transcript on appeal were not part of the pleading and were not introduced through any other proceeding leading to default judgement the letters were not part of the record on appeal and could not be considered by the reviewing court. There is no evidence to show that the letters

were exhibits as part of the trial court's record. No exhibits were attached to the Association's motion which makes the record before this court complete now as they were when the trial court made its order. The appellant should not be required to bring records on appeal which were not presented to the lower court. If the Association did attach and file exhibits with its motion, Rule 75(6) T.R.C.P. provides that exhibits tendered and admitted shall remain in the custody of the Clerk of the Court at all times, thus assuring the safety of these documents and they would be part of the record on appeal. It is inconceivable that the Association's motion survived the custody of the Clerk of the Court and only the exhibits which were allegedly at-

tached escaped without evidence of their existence as part of the motion. Further, the Association failed to challenge appellant's statement "...that there was no such request in the record,"..."neither was there any request presented to the trial court which could form the basis of an order for sanction." (Page 3, lines 6,7,8 appellant's brief). See State Banking Board v. Valley National Bank 604 Sw2d, 415, 419 (Civ.App.-1980). The Austin court held that, "....exhibit must be admitted into evidence at the hearing....in order to become a part of the record on appeal." There is no evidence of probative force to support the court's conclusion.

Assignment of Error #1(b)

The Court of Appeals erred when it over-

ruled appellant's first and second points of error when it considered by presumption exhibits which were not part of, and could not be a part of the record on appeal by virtue of fact that said exhibits were not part of the trial court's records.

The Court of Appeals is in error by concluding the exhibits which were no part of the trial court's record to be "....proper discovery request." It is well established law that only exhibits submitted and admitted into evidence at a trial, hearing or other proceeding by the trial court will become part of the record on appeal. The Association neglected to present their exhibits for consideration. Further, the request for discovery constitutes a prerequisite for the granting of sanction. And except it is proven that the Association's

exhibits were attached to the motion and considered by the trial court, the Court of Appeals may not consider them "proper discovery request" because this is a mandatory requirement upon which sanctions are based a mere presumption is inadequate tc support sanction of a default judgement. The court elected to consider the alleged exhibits and determine that they were proper request conforming to mandatory provision requiring a statement of reasonable time, place and manner. The court has assumed that the trial court saw the letter but refers to no supporting fact. The court is in error. The court should consider on what is properly before it. "Where an essential link in the proof of dedication was a map of a subdivision and there was no indication that map

was introduced into evidence at trial a copy of the subdivision was not part of the record and could not be considered." City of Mission v. Popplewell 295 Sw2d, 712 (Texas-1956).

Assignment of Error #1(c)

The Court of Appeals erred in its opinion that the appellant is under burden to present exhibits as part of the record on appeal, when such exhibits were not submitted or admitted as evidence or formed any part of the trial court's records.

In overruling appellant's first and second point of error the Court of Appeals held that under Rule 50(d) of Tex.R.App.P. the appellant is under burden to present sufficient records to show error and that letters which the Association claims were exhibits but not attached to

their motion for consideration by the trial court, were under the duty of appellant to be presented on appeal. As stated before, and hereinafter the Association failed to attach any exhibits to their motion and as such no exhibits were presented to the trial court and therefore appellant was under no duty to bring exhibits that were outside the trial court's records. See Garza v. Levin 769 SW2d, 644 (Civ.App.-1989) "...the appellate court may only consider evidence on file before the trial court at the time of hearing which gave rise to the appealed from order." Rule 50(b) of Tex. R.App.P. is not applicable in instances where documents are not part of the trial court records. See

The appellant has discharged his

burden by presenting appropriate and sufficient records, in fact all the records appearing before the trial court in excess of 800 pages. On June 18, 1990, appellant filed a request for transcript (Tr-795) in the Clerk of the Court's office and listed ninety-seven items. Item number seven (#7) lists plaintiff's motion for sanction for failure to allow inspection of property. On July 27, 1990 the Clerk of the Court certified the request (Tr-836) and indexed the Association's motion to be located in the transcript at (Tr 45-46). No exhibits were attached as was the case then and now. Appellant is not and should not be held responsible for their failure to attach their exhibits to their motion. The absence of which magnifies the impro-

priety of the trial court's order granting sanction. In reversing a default judgement against a defendant the Court of Appeals, states that "when a reviewing court is called upon to revise ruling of a trial court such reviewing court must do so on record before the trial court when the ruling was made, and a party is not permitted to try a case on appeal on different statements of facts than that presented to the trial court". Grapevine Trucking Inc. v. Shepherd 366 Sw2d, 950 (Civ.App.-Fort Worth-1963) ref. n.r.e.

Assignment of Error #2

The Court of Appeals erred in overruling that the appellant's first and second points of error on the basis that insufficient record was brought forward to show error, when the record shows otherwise.

In reviewing appellant's first and second points of error the court refers to the Association's letters to appellant that it asserted were request for inspection and that these letters were attached as exhibits to the Association's motion. Also that the appellant had failed to bring these letters purporting to be "request" as part of the record for review. There were no exhibits attached to the Association's motion although the letters were described and designated as exhibits within the body of appellee's motion, none was attached to it or presented to the trial court. The appellant stated this on page 3 of his brief addressing his first point of error. See appellant's brief (p-3).

So far the appellant has brought

a complete and sufficient record to show error. As set out below. The appellant requested plaintiff motion for sanction for failure to allow inspection of property as item No. 7 appearing at (TR-795). The Clerk of the Court's certificate of delivery (TR-836) identifies it at (TR-45) and as stated in his brief, it contains no exhibits or letters or request for inspection. The trial court none-the-less granted sanction from which this appeal originates. The Court of Appeals is in error in concluding that the record before it is incomplete to show reversible error and that it must engage every reasonable presumption to be in favor of the trial court's ruling. The Association's motion (TR-45) contains enough evidence to sustain appellant's

points of error. In the absence of appellee exhibits their motion should be reviewed. Smith v Southern Land Development, 385 Sw2 558, Houston,TX 1964. The court has failed to take note that the Association affirmatively declared in their motion (TR-45) the content and nature of the letter of August 18, 1988 designated Exhibit "B" and the other of October 12, 1988 designated as Exhibit "B". In describing the content of Exhibit "A" the Association writes:

"By letter dated August 18, 1988, Plaintiff's counsel requested Defendant Cox to set up convenient times to allow inspection of the cars on the subject property." A similar request was made in the letter of October 12, 1988 and is supported by the Association's complaint (TR-46) that..."Despite Plaintiff's repeated re-

quest for defendant Cox to set up convenient times....Defendant has failed and refused and still fails and refuses to allow such inspection." (See pages 13a, 13b, 13c and 13d).

In their brief (page 8) the Association claims both letters constituted the basis of their request but they were never presented to the trial court and no reference is made to any other document. The Association authored (wrote) both the letters and the motion. And in the motion describes the letters with sufficient detail of its content to show that the letters were defective as "proper discovery request" insofar as they requested Appellant (Cox) "...to set up convenient times." There is not a more credible source or a need to seek another reference. The appellant is under no duty to set up times, determine the place or man-

ner of inspection or obligated to do anything until a proper discovery request is served. The Association's own statement confirms unequivocally appellant's complaint that a proper request was never presented and supports his points of error one and two.

Under Rule 167(1)(c) the requesting party is mandated to submit a request containing all three elements. If that party delegates or imposes any of the required elements to another, as the Association has demonstrated, a proper request has not been executed or submitted by the requesting party. And, if served, is defective and cannot form the basis for sanction for failure to comply as the Association requested of the trial court. (TR-47)

"Because of Defendant Cox's repeated refusal....sanctions should be imposed against Defendant."

The trial court erred when it granted sanctions (TR-66) against the appellant, denied his objection made in Defendant's Response to Plaintiff's Motion for Sanction for Failure to allow Inspection." (TR-57). See Defendant's Response to Plaintiff's Motion for Discovery Inspection (TR-60). With this much evidence on record before the Court of Appeals it should reconsider its opinion that sufficient record was not brought forward, to show reversible error. The record shows that appellant was diligent in bringing sufficient records for review (TR-795) Item #7 and (TR-836) index 45. If the Association's exhibits were attached to their motion they would be part of this record before the Court of Appeals. And their absence clearly attests to the fact that they were not. This Court should also note that the Association failed, in

their reply to Appellants points of error one and two, to challenge àppellant's statements that (1) the Association's discovery request was void of either a specification of time, place, or manner as required, and (2) that there was no such request in the records meaning no letters or exhibits. (Page 3 Appellant's brief) (3) "...that neither was there any request presented to the trial court." Under Rule 419, Texas Rules of Appellate Procedure: "Any statement made by appellant in his original brief as to the facts or record may be accepted as correct unless challenged by opposing party."

J. C.Biscamp v. Zeno Carpet Co. 473 Sw2d, 218 (Civ.App.-Beaumont 1971) also, Bond v. Bond 547 Sw2d, 43,(Civ.App.-Eastland-1977).

There is evidence that the trial court did not see any letters of request as exhibits

and there is evidence that letters sent to appellant "as request" are improper by admission in the Association's motion. Further, if the Court of Appeals accepts the Association's statement that their exhibit was attached to the motion, the court should also accept with equal value, their statement that the letters requested appellant to setup times for inspection, contrary to the mandatory requirement of Rule 167(1)(c). The record is sufficient to show reversible error.

Assignment of Error #3

The Court of Appeals erred in its interpretation of the trial court's order of January 16 and February 27, 1989 and is in error by overruling appellant's third point of error.

The Court of Appeals erred by directing its attention to the meaning of the word "inspection" rather than an

investigation into the context and clarity of the order to adequately inform the appellant, without inferences, as to what he is required to do. The meaning of the word inspection is not at issue, the direction or instruction in the order is at issue and is the fundamental complaint in appellant's third point of error. Asserting that the order was improper, void, vague and without foundation. Assume the order (TR-66) was proper for the purpose of awarding sanctions, it could also be void for incompleteness or ambiguity or too vague to be a directive, which would justify a party's failure to comply.

"The court has incorrectly attributed an "absurd" interpretation, by its own definition, to appellant when in

fact the appellant made no interpretation at all regarding exterior or interior inspection, unlocking of the cars or presentation of keys; this information is imputed by the court. The order (TR-66) does not contain any of the conditions inferred by the court. By contrast if the order was properly constructed this interpretation would not be necessary. The court is in error in holding that "....therefore the appellant did violate the first order." (Court of Appeals Opinion - page 9), when such instruction is not in the order. For a party to be held in violation of a court order the order must specify details of compliance in language clear and unambiguous.

The order imposed two conditions, the one being that the appellant pay $200

to Plaintiffs. This is clear and unambiguous instruction requiring no interpretation, and was complied with. The second condition ordered appellant to "allow" the association to inspect cars on his property. The order did not require him to "assist" or be present, neither did it specify the purpose of the inspection or what conditions should be ascertained; and the absence of such material factors renders the order vague and incomplete to adequately inform the appellant of his obligation beyond providing access to the vehicles and opportunity to inspect. The Texas Supreme Court in a 1967 habeas corpus proceeding laid down the requirements of a valid enforceable order. Ex Parte Slavin 412 Sw2d, 43 (Texas Supreme 1967). "For a person to be held in

(contempt) violation of a court decree, the decree must spell out details of compliance in clear, specific and unambiguous terms so that the person will readily know exactly what duties or obligations are imposed on him." Texas decisions hold that an order of the court "...must be definite, clear and precise as possible and when practicable it should inform the defendant of the acts he is restrained from doing (or obligated to do) without calling on him for inferences or conclusions about which (other) persons might well differ and without leaving anything for further hearing." San Antonio Bar Assn v. Guardian Abstract & Title Co. 291 Sw2d, 697 (Texas Supreme 1956).

The Court of Appeals in its opinion affirming the trial court's second

finding of fact stated that "both the first and second orders for sanction instructed the appellant to allow a complete, including a mechanical inspection of the cars." (Opinion page 17). This is simply not so and reference to each order (TR-66) and (TR-114) will show the court to have misrepresented the content of the orders. Neither did the orders instruct the appellant to provide keys or unlock the cars (Opinion page 9). The appellant should not be sanctioned for failure to do what was not ordered. In Ex Parte Roy A. Lee, 704 SW2d, 15, (Tex 1986) the Supreme Court found that Lee was ordered only to produce documents, not to answer interrogatories and ordered him released on contempt charges. Additionally the Association had the

opportunity on February 14, 1989 to revise their order and include a specific demand for a demonstration of operability, but this would be ascertaining a cause of action rather than a search for supporting evidence and would likely alert the court. The Association chose not to modify the order.

Assignment of Error #4

The Court of Appeals has misplaced the law regarding non-profit corporations and a commercial for-profit corporation in overruling appellant's point of error number four.

Under the provisions of the Texas Non-Profit Corporation Act, Tex. Rev. Civ. Stat. Article 1396.2.23(3) and the bylaws of the Boudreaux Civic Association, Inc. (TR-593) every member has a statutory right to

inspect the books and records at any reasonable time. See Texas Society v. Fort Bend Chapter 590 Sw2d, 156 (Civ.App.-1979) ref. n.r.e. also Board of Directors of By the Sea Council v. Sondock et al 644 Sw2d, 774 (Civ.App.-1982) ref. n.r.e. No part of the Association's records are prohibited from inspection. The court is in error. Texas Business Corporation Act is irrelevant likewise the cases cited by the Court of Appeals. And that such right is undeniable.

Assignment of Error #5

The Court of Appeals has erred in overruling appellant's fifth point of error and has misplaced the fact that Judge Smith recused himself on an untimely motion to recuse and such order is reviewable on appeal.

In overruling appellant's point of error number eight, the court has failed to address the facts as appear in the record. That the Association failed to meet the mandatory filing requirement by filing their motion to recuse Judge Smith (TR-286) on September 5, 1989, less than ten days before defendant's scheduled hearing of his motion 318 (TR-284) on September 8, 1989 contrary to the provisions of Rule 18(a) of T.R.C.P. The record shows that the Association's motion was legally and factually insufficient to support the motion. But that a probability existed Don Sheldon Smith might be called to testify. Don Smith is not a party or attorney in this case, has no personal knowledge of the facts relevant to the 1983 case or the current case and could only repeat information that was reported to him in his capacity as attorney for Bou-

dreaux Civic Association. Under Rules 602, 802 of Texas Rules of Civil Evidence Don Smith could not testify. The authority cited by the court is factually different District Judges v. Commissioner's Court 677 SW2d, 743 745. An order of recusal is not reviewable if that order was issued by an assigned judge or the presiding judge of the administrative district as in the case of District Judges v. Commissioner's Court. A third judge intervened, heard the motion on merits and disqualified Judge Holland from presiding over proceedings regarding his own orders. The facts are strikingly different and distinguishable. The appellant's complaint is that Judge Smith recused himself contrary to rule when the motion was submitted less than ten (10) days before appellant's motion was to be heard in violation of Rule 18(a) Tex.R.Civ.P. (1989). Because

there was no intervening party to review the motion and order, Judge Smith's action is reviewable by the Court of Appeals. Further, Judge Smith's action is contrary to Limon v. State 632 SW2d, 812 815 (Civ.App.-1982); Autry v. Autry 646 SW2d, 597 Civ.App.-1983); Gonzales v.Gonzales 659 SW2d, 900 (Civ.App.-1913). Unless a motion to recuse is timely filed the mandatory provision regarding hearing referral and recusal do not come into play. The Court of Appeals is therefore in error.

Assignment of Error #6

The Court of Appeals erred in overruling appellant's sixth point of error by misplacing the law and concluding that Judge Smith's order is not reviewable and sanction cannot be granted.

Judge Smith signed an order recusing himself on an untimely motion by the Associa-

tion thus bypassing the authority of the assigned judge or the presiding judge to consider the motion and the propriety of the order. His order is therefore reviewed on appeal. Since the Association's motion was untimely and brought for purposes of delay, Rule 18(h) T.R.C.P.(1989) provides for sanctions as authorized by Rule 215(2)(b). This court now has jurisdiction and the authority to make such ruling as should have been made by the trial court. District Judges v. Commissioners Court is not controlling when the trial judge recuses himself on an untimely motion or on any order which bypasses the administrative judge. Judge Smith's recusal order is located at (TR-327).

Assignment of Error #7

The Court of Appeals erred by misplacing the facts and the law when it overruled appellant's seventh point of error on the

premise that he could have raised his counter claims in the 1983 suits, when such claims matured in 1985.

In 1983 the Association brought suit (TR-441) against appellant prohibiting him from using an outbuilding as a temporary residence. In June 1985 the Association signed a written document (TR-23) granting another property owner permission to use an outbuilding as a temporary residence. The same privilege they denied the appellant by their law suit in 1983. The Court of Appeals is mistaken to conclude that a cause of action which arose in June 1985 could have been presented as a counter claim in 1983 two years before its occurrence. The Texas Supreme Court has held that a cause of action comprises both the existence of a right and facts sufficient to constitute a claim for relief. Linken Hoger v. American Fidelity 260 SW2d, 884,-

886 (Tex. 1953). No element of appellant's counter claims could have been raised in 1983. Neither res judicata, collateral estoppel, or statute of limitation is a bar to appellant's counter claims. By March 1987 the appellant became aware that the Association's action was selective as evidenced by the document signed in June 1985 which was presented to the trial court (TR-445). Under Texas Discovery rule appellant's cause of action accrued when he learned of the document signed in June 1985 and was then able to seek relief. See Weaver v. Witt 516 SW2d, 792, 794, (Tex. Sup.- 1977) also Bayouth v. Lion Oil Co. 671 SW2d, 867,868 (Tex. Sup.-1984), Miller v. Dickerson 677 SW2d, 253,257-58 (Civ.App.-1984) ref. n.r.e. The Court of Appeals erred in affirming the judgement of the trial court when there existed genuine issues of material

fact which should preclude the granting of summary judgement also the absence of similarity in cause of action, issues, subject or relief sought. And further whether an action may be filed two years before the cause has materialized. The Court of Appeals is in error and should reverse its opinion.

Assignment of Error #8

The Court of Appeals erred in overruling appellant's eighth and third points of error by misrepresenting the facts stated in the record and misapplication of the law.

In reviewing appellant's points of error eight the Court of Appeals misrepresented the facts and the law as on page 11 and 12 of their opinion. Initially a non-profit corporation does not operate under the Texas Business Corporation Act and as such is not a controlling factor in appel-

lant's request to inspect the Association's books and records. Appellant has a statutory right under Texas Non Profit Corporation Act, Article 1396:2.23(b) and Article XV of the bylaws of the Boudreaux Civic Association, Inc.. The record before the Court of Appeals shows that (TR-280) appellant agreed to a visitation schedule on August 19, 1989 which was altered August 20, 1989 (TR-281) by Brenda Tolleson without consultation with appellant. The appellant appeared for inspection on the days and at the times that remained unaltered by Tolleson. The court has failed to identify any law or rule that defines the exercise of a statutory right as harassment or failure to exercise that right as a sanctionable act. See (TR-277) (TR-301). The court has also misrepresented the facts as set out in appellant's brief page 26, and the supple-

mental transcript (STR-16) and (STR-16A). The appellant stated that he received notice on September 25, 1989 to appear for a deposition three days later on September 28, 1989. And that he advised the Association's attorney on September 27, 1989 (TR-598) that he could not appear because of the late notice which he acknowledged September 28, 1989 by return receipt. (1st Supplemental Transcript page #16A). Three days notice is not considered reasonable or adequate. The Dallas Court of Appeals considered four days inadequate. Brohmfalk v. Linwood 742 SW2d, 518, at 520. The trial court is authorized to impose sanctions that are just , Rule 215, T.R.O.C.P. The trial court exceeded its authority when it granted sanction without reviewing the mandatory request upon which the sanctions are authorized. No sanctions are authorized for failing to do

what was not required in a court order. No sanctions are authorized for exercising a statutory right. No sanctions are authorized for failure to appear for deposition upon three days unreasonable notice. The court has failed to identify or define which of appellant's motions and responses are frivolous and why they are considered so. The rule requires that courts shall presume that all pleadings and motions and other papers are filed in good faith. The court has instead granted sanctions (TR-549) without good cause and failed to state the particulars in the sanction order regarding the filing of frivolous motions, Rule 13 T.R.C.P. Watkins v. Pearson 795 SW2d, 257,260 (Civ.App.-1990). The Court of Appeals has misplaced the facts and the law in overruling of appellant's third and eighth points of error. The granting of the third order for sanc-

tions and striking appellant's pleading was unauthorized and unjust. The court has failed in its duty to examine the facts as they appear in the record and apply the proper law.

Rodenbaugh v. Beachum 576 SW2d, 143 (Civ.-App.-1978) ref. n.r.e.

Slavin v. Plano Savings & Loan 711 Sw2d, 281 (Civ.App.-1986) ref. n.r.e.

Texas Society v. Fort Bend Chapter 590 SW2d, 156 (Civ. App.-1979) ref. n.r.e.

General Motors v. Lawrence 651 SW2d, 732 (Tex.Sup.-1983)

Ray v. Beene 721 SW2d, 876 (Civ.App.-1986) ref. n.r.e.

Assignment of Error #9

The Court of Appeals erred in overruling appellant's ninth point of error by misstatement of the facts and misapplication of the law requiring judges to recuse themselves on grounds of personal bias.

Under Rule 7 T.R.C.P. any party to a suit may appear and defend his right in person if he so chooses. Additionally Rule 18 provides that judges shall recuse themselves in proceedings in which they have a personal bias or prejudice concerning the subject matter or a party. The judge made his prejudice and bias unquestionably clear to the degree that appellant concluded that so persuasive a disposition would impair the judge's ability to exercise an impartial trial. The judge's order to "go get an attorney or lose your house" was contrary to appellant's rights and indication of a preconceived outcome of this suit against the appellant. The judge's statement that, "I am not about to waste my time or anyone else's time," demonstrates that the appellant's appearance before Judge Powell was a waste of his time. Judge Powell holds an elected

public office with no authority to select whether he will hear a pro se litigant or an attorney or whether same is a waste of his time. The Texas Supreme Court has upheld a party's right to represent himself. Ex Parte Shaffer 649 SW2d, 300 (Tex.Sup.-1983). This court has a duty to examine the ruling, rather scrutinize the ruling of the trial court for improprieties, bias or prejudice rather than conclude that the judge's statements were taken out of context. Aldridge v. State 342 SW2d, 104 (Crt.App.-1961). The judge's ruling on every occasion was in favor of the Association. See (TR-337), (TR-363), (TR-425), (TR-486), TR-549), (TR-735). The defendant in the trial court filed a motion to recuse (TR-691) to preserve this complaint, the hearing is located at (TR-802). The judge's statements were made over a three day period and

cannot therefore be considered out of context. The Court of Appeals is in error in concluding such.

Assignment of Error #10

The Court of Appeals erred in affirming a permanent injunction by the trial court when there exists no proof or evidence of damage or violation of a deed restriction. As set out in appellant's tenth point of error.

A party seeking injunctive relief must plead and prove entitlement to such by offering proof of current or imminent damage. The Association has failed to prove the inoperable condition they claimed violated the deed restriction. As a result the trial court denied any civil damages which is consistent with failing to prove ones case. And the granting of a permanent injunction is improper in this case. The Supreme Court has held that

writs of injunction should not be issued on mere surmise. Millwright Local Union #2484 v. Rust Engineering Co. 433 Sw2d, 683 at 687, (Tex.Sup.- 1968), also Mother and Unborn Baby Care of North Texas 689 SW2d, 336 (Civ.App.-1985) writ dismissed. The Court of Appeals has overlooked page 68, lines 3 through 8 of the statement of facts. The trial judge stated an inoperable condition was not proved. An injunction should not be granted.

Assignment of Error #11

The Court of Appeals erred when it affirmed the trial court's granting of attorney fees when such award is not authorized except in conjunction with an award of damages and the violation of a deed restriction.

The record shows that no violation of the deed restriction, the Association failed to prove their case and denied any

damages. See finding of fact #7 (TR-778). As a general rule attorneys fees are not recoverable except where a violation of the restriction is shown. The trial court stated that an inoperable condition was not proven and the award of attorneys fees is improper. Freedman v. Briarcroft Property Owners 776 SW2d, 212 (Civ.App.-1989); also Taylor Textiles v. Pacific Compress Warehouse 575 SW2d, 738 (Civ.App.-1977). Only a breach of a restrictive covenant would entitle the Association to attorneys fees. The Court of Appeals is in error to affirm such a ruling by the court below. See also Townplace Homeowners Association, Inc. v. McMahon 594 SW2d, 172 (Civ.App.-1980) ref. n.r.e.

Assignment of Error #12

The Court of Appeals erred in affirming the trial court's findings of fact when there is no evidence to support such find-

ing. The facts and the law are contrary to the court's finding as set out in appellant's point of error twelve except for finding of fact #7.

The Court of Appeals failed to state where in the record a mechanical inspection was ordered, neither date, page or line is referred to, but affirms the trial court's finding of fact. Or where any evidence is located confirming that a proper request was presented to the trial court, forming the basis of order subject to prerequisites. The Court of Appeals in the exercise of its duty is obligated to make an independent and impartial examination of the record and note its finding for comparison with that found by the trial court. If such finding, adequately referenced, coincides with that of the trial court, then the ruling of the trial court should be affirmed. The Court of

Appeals has failed to state its own finding supporting that of the trial court. In its first finding of fact the court failed to state what evidence established that appellant prevented the Association from making its inspection.

In affirming the second finding of fact the court has failed to identify the location of any order instructing appellant to allow a complete inspection, including a mechanical inspection.

In affirming the third finding of fact the court has failed to identify any rule or law that prohibits a statutory right to inspect the books and records of a non-profit corporation by any of its members.

In affirming the fourth finding of fact the court has failed to identify any motions or responses deemed frivolous by court order in which the particulars of

such motion or responses are stated for purposes of sanction in accordance with Rule(s) 13 & 215 T.R.C.P.

In affirming the fifth finding of fact the court has misrepresented the fact that appellant's notice for deposition was untimely and unreasonable and three days is insufficient notice to be considered a discovery abuse.

In affirming the sixth finding of fact the court has failed to apply the facts on record with applicable law and overrule the trial court findings of facts one through five. No evidence exists to support such findings by the trial court, and do not constitute good or just cause for a default judgement.

In affirming the trial court's eighth finding of fact the court failed to show that appellant did violate the deed restriction, and that there was anything to

abate. And by its ninth finding of fact that a permanent injunction was necessary.

Assignment of Error #13

The Court of Appeals erred in overruling appellant's thirteenth point of error when the trial court's conclusion of law is misplaced and not supported by the facts as they appear in the record.

The court has failed to show that the action of the trial court was just and proper in ordering sanction without the mandatory prerequisites for such order, for granting sanction for one's failure to do what was not ordered by the court and to state what law defines the exercise of a statutory right, harassment or a sanctionable act. The court has not shown any frivolous motions or responses or complied with Rule 13 T.R.C.P. to state the particulars of such motions and response, or show where a three day notice to appear for deposition is considered reasonable

and adequate. The court is in error to find a breach of the deed restriction as the basis for a permanent injunction. The record shows no breach, only that the suit was brought on the basis of an assumption. See Statement of Facts, page 22, lines 10 through 25, page 68, lines 3 through 8. A permanent injunction should not be issued on an assumption. Additionally the court has failed to reverse an award of attorneys fees when no breach of a restriction has been proven. The court's conclusions of law are not supported by the facts in the record and inconsistent with law relevant to those facts.

IN CONSIDERATION of the foregoing assignments, appellant prays that this court will set aside its judgement of March 14, 1991 and reverse the judgement of the trial court and in all things grant the relief prayed for.

WHEREFORE, this Court of Appeals having the duty and authority as a matter

of law to make an render the proper judgement that the trial court should have made and for this and all the reasons set forth above.

(1) Defendant prays that this court will reverse the judgement of the trial court granting a permanent injunction and awarding attorneys fees and cost and render same be dissolved and denied. And that all and total cost be charged against the Plaintiff, Boudreaux Civic Association, Inc.

(2) Defendant prays that the Partial Summary Judgement entered against him on his counter claims be REVERSED AND REMANDED for trial on its merits.

(3) Defendant prays that this court issues an order mandating the trial court to vacate its protective order and release all

documents for inspection by Defendant.

(4) Defendant prays that this court will issue an order directing Boudreaux Civic Association to produce unconditionally its books and records for inspection by Defendant as set out in Article XV of the Association's by-laws. Or in the alternative, direct the trial court to so issue an order.

(5) Defendant prays that this court will issue an order directing Boudreaux Civic Association to refund $200.00 to Defendant paid to them in compliance with an improper court order. Or in the alternative, direct the trial court to so issue an order. And that same be paid within fifteen (15) days of signing of such order.

(6) Defendant prays that he be granted all of any further relief general and specific, at law or in equity to which he may be justly entitled.

Respectfully submitted,

/s/ Leary Cox

CERTIFICATE OF SERVICE

I, Leary Cox, hereby certify that a true and correct copy of the foregoing appellant's second motion for rehearing (#01-90-00657) was sent by Certified Mail return receipt requested to Plaintiff's counsel, Mr. Stephen Dillon, at 7322 Southwest Freeway, Suite #825, Houston, Texas, 77074, on this _____ day of _____ 1991.

Receipt #

/s/ Leary Cox

AFFIDAVIT

STATE OF TEXAS §
COUNTY OF HARRIS §

Before me, a Notary Public in

and for the State of Texas, on this the 10th day of May, 1991, personally appeared LEARY COX, of lawful age and qualified in all respects to make this affidavit, who first being sworn on oath say that he is the Movant in this Second Motion for Rehearing, and that the certificate of service was executed as stated therein, and that he has personal knowledge of all facts and allegations made herein.

_____

Numae L. Blevins
Notary Public in and for the
State of Texas.
My Commission Expires:_____

* * * *

No. 01-90-00657 CV

LEARY COX, Appellant	§	In the Court
	§	of Appeals
v.	§	
	§	First Judicial
BOUDREAUX CIVIC	§	District
ASSOCIATION, INC.	§	
et al.	§	For the State
	§	of Texas

Appellant's Motion for Leave to Supplement Record on Appeal

To the Honorable Court of Appeals:

Now comes Leary Cox, Appellant in the above styled and numbered appeal and moves this court for leave to supplement the record before this court. And in support

thereof would show the following. On July 27, 1990 Appellant filed transcript and statement of facts in this appeal. In his brief the Appellant contends that all records appearing before the trial court was available for review by the court. On March 14, 1991 the court entered judgement against Appellant and in its opinion held that letters which the Association sent to Appellant were proper request for purposes awarding sanction and the Appellant was under duty to bring these letters forward for review even though they were not presented to the trial court for consideration in granting sanction. In his motion for rehearing Appellant stated in some detail the absence of the letters before the Court of Appeals. In order therefore that the records be supplemented Appellant moves this court for leave to file copies of two letters received from Appellees'

counsel dated August 18, 1988 and October 12, 1988 and copy of one letter sent to appellees' counsel on August 31, 1988 by Appellant that same may be part of the record.

WHEREFORE Appellant prays that this court will enter an order granting leave to supplement and include the attached three letters into the record before the court.

Respectfully submitted,

/s/ Leary Cox

* * * *

(Letterhead of Schimmel & Associates, P.C.

August 18, 1988

Mr. Leary Cox
P. O. Box 70203
Houston, Texas 77270

Re: Cause No. 88-36371; Boudreaux Estates Civic Assn., Inc. vs Leary Cox

Dear Mr. Cox:

In order that we may proceed with the

discovery on this matter, this letter will serve as our request for you to arrange some convenient dates and times for a mechanic, an attorney, and a representative of the Association to come and inspect the vehicles in question. We would like to have this completed by the end of August. If you respond to this request within the next 5 days, we can do this by agreement. If you do not wish to cooperate with this request, we will have no alternative but to make a Motion for Inspection and get a court order to have this discovery done.

Also, as required by the court, please put your telephone number on all future pleadings which you may file.

Very truly yours,

/s/Bruce Ian Schimmel

August 31, 1988

SCHIMMEL & ASSOCIATES, P.C.
8300 Bissonnet, Suite 170
Houston, Texas 77074

Dear Mr. Schimmel,

A speedy resolution of the matter at hand would be in the better interest of all concerned. Your letter dated August 18, 1988 was received on the 29th, making it impossible to meet your request before August 31st.

I have considered your request for an inspection, in the event you are unaware Mrs. Tolleson made two visits advisably for similar purposes. However, I would ask that you provide me with an overview of the nature and scope of the proposed inspection. In the meantime I will review my schedule and upon your reply advise you accordingly.

Very truly yours,

s/Leary Cox

Letterhead of Schimmel & Associates, P.C.

October 12, 1988

Mr. Leary Cox
P. O. Box 70203
Houston, Texas 77270

Re: Your Previous Letter Dated August 31, 1988

Dear Mr. Cox:

I did receive your original letter, although I appreciate you sending me a second copy on September 25, 1988.The purpose of the inspection is to provide discovery in accordance with Rules of Civil Procedure. The scope of the inspection will be to start the cars to see if they are operable and to inspect the interior and exterior of the cars for licensing and permits. I was aware that Mrs. Tolleson had briefly made entry on your property before, however, she was unable to actually make a full and complete inspection of the cars at that time and has

no technical knowledge regarding the same. The Association will bring a mechanic or other representative to perform the actual inspection. Please give me several times and dates within the nest two (2) weeks and I will inform you of which one we choose. It would be very helpful if you would enclose a telephone number so that I could contact you by telephone regarding these matters.

I was also intrigued by your statement that a speedy resolution of the matter at hand would be in the better interest of all concerned. If you have a proposition regarding the same, please contact me either by phone or in writing and I will provide your proposal to the board of directors.

I do hope that you have realized by now that the Association has no desire to take any action against you based upon

race, creed, or natural original and is merely trying to keep the neighborhood nice. I also hope that you realize that the other parties that you eluded to you in your pleadings have been the subject of a lawsuit which went to trial yesterday and that they abandoned the premises that they were occupying as a result of the court action. A permanent injunction and attorney's fees were also awarded the Association. Thank you for your consideration regarding these matters.

Very truly yours,

/s/ Bruce Ian Schimmel

IN THE SUPREME COURT

FOR THE STATE OF TEXAS

LEARY COX - Petitioner

vs

BOUDREAUX CIVIC - Respondents

ASSOCIATION, INC. et al

On appeal from the 80th District Court of Harris County, Texas No. 88-36371

* * * *

APPLICATION FOR WRIT OF ERROR

* * * *

Leary Cox, pro-se

NAMES OF PARTIES

Petitioner	-	Leary Cox
Respondent	-	Boudreaux Civic Association, Inc.
		Brenda Tolleson
		Dianne Trimm
		Larry Trimm
		Susan Hughes
		Pat Prejean
		Dwayne Prejean
		Sissy Doyle
		John Walton

Attorney for Respondents -
Stephen P. Dillon
Schimmel & Associates, P.C.
7322 Southwest Frwy #825
Houston, TX 77074

Presiding Judge -
Honorable William Powell
80th Judicial Dist. Court
Harris County, Texas

Court of Origin -
Honorable Shearn Smith
61st Judicial Dist. Court
Harris County, Texas

* * * *

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Page 63 Wooten v. American Motorist In. Co., 570 SW2d 572

Page 39 Zale Corporation v. Rosenbaum, 520 SW2d 899 (Texas-1975)

* * * *

NATURE OF THE CASE

This is an injunction suit brought by Boudreaux Civic Association, Inc. alleging that LEARY COX had maintained inoperable cars on his property and that he had vio-

lated paragraph #6 of the restrictive covenants applicable to all property in the subdivision. Leary Cox filed answer by special denial and thereafter filed counter suit against the Association and its officers declaring selectivity and discrimination in the enforcement of the deed restrictions and that the Association had waived its right by delay and acquiescence in enforcing the deed restriction. Plaintiff was awarded a default judgement and trial for damages was heard by the court without a jury. The court found no civil damages but issued a permanent injunction and attorney's fees. The Court of Appeals affirmed the judgement of the trial court in all respects.

APPLICATION FOR WRIT OF ERROR

STATEMENT OF JURISDICTION

The Supreme court has jurisdiction of this suit under V.T.C.A. Government Code

§22.001(a) subsection (2.) and subsection (6). Under subsection (2.) the Court of Appeals affirmed the action of the trial court which struck Petitioner's pleading and entered default judgement as sanction for discovery abuse without just cause, reference to mandatory requirements, contrary to Petitioner's statutory rights, contrary to statutes, Texas Rules of Civil Procedure and precedents set by other Courts of Appeals and the Texas Supreme Court.

APPLICATION FOR WRIT OF ERROR

ASSIGNMENTS OF ERROR

1

The Trial Court erred when it failed to dismiss a groundless lawsuit evidenced on the petition as having no basis in fact or law and was answered by special exception. (p-1).

1(a)

The Court of Appeals erred in overruling Appellant's first and second points of error by concluding that the records on appeal were incomplete without evidence to support its conclusion. (p-4).

1(b)

The Court of Appeals erred when it overruled Appellant's first and second points of error, when it considered by presumption exhibits which were not part of and could not be part of the record on appeal by virtue of fact that said exhibits were not part of the trial court's records. (p-8).

1(c)

The Court of Appeals erred in its opinion that Appellant is under burden to present exhibits as part of records on appeal when such exhibits were not submitted or admitted into evidence or formed any part of

the trial court's records. (p-9).

2

The Court of Appeals erred in overruling Appellant's first and second points of error on the basis that insufficient record was brought forward to show reversible error when the record shows otherwise. (p-11).

3

The Court of Appeals erred in its interpretation of the trial court's orders of January 16, 1989, and February 27, 1989, and is in error by overruling Appellant's third point of error. (p-21).

4

The Court of Appeals has misplaced the law regarding non-profit corporations and a commercial for-profit corporation in overruling Appellant's point of error number four. (p-28).

5

The Court of Appeals has erred in overruling Appellant's fifth point of error and has misplaced the fact that Judge Smith recused himself on an untimely motion to recuse and such order is reviewable on appeal. (p-30).

6

The Court of Appeals erred in overruling Appellant's sixth point of error by misplacing the law and concluding that Judge Smith's order is not reviewable and sanctions cannot be granted. (p-33).

7

The Court of Appeals erred by misplacing the facts and the law when it overruled Appellant's seventh point of error on the premise that he could have railed his counterclaims in the 1983 suit, when such claims matured in 1985. (p-35).

8

The Court of Appeals erred in overruling Appellant's eighth and third points of error by misrepresenting the facts stated in record and a misapplication of the law. (p-40).

9

The Court of Appeals erred in overruling Appellant's ninth point of error by misstatement of the fact and misapplication of the law requiring a judge to recuse himself on personal bias. (p-47).

10

The Court of Appeals erred in affirming a permanent injunction by the trial court when there exists no proof or evidence of damage or violation of deed restriction as set out in Appellant's tenth point of error. (p-50).

11

The Court of Appeals erred when it af-

firmed the trial court's granting of attorneys fees when such award is not authorized except in conjunction with an award of damages and the violation of a deed restriction. (p-52).

12

The Court of Appeals erred in affirming the trial court's findings of fact when there is no evidence of insufficient evidence to support such findings and the facts and the law are contrary to the court's finding as set out in Appellant's point of error excepting for finding of fact No. 7. (p-54)

13

The Court of Appeals erred in overruling Appellant's thirteenth point of error when the trial court's conclusions of law are misplaced and not supported by the facts as appearing in the record. (p-58).

14

The Court of Appeals erred when it denied Appellant's timely motion for leave to supplement the record and introduce letters which it said were proper request before the trial court. (p-61).

15

The Court of Appeals erred by its failure to address a sub point on page 4 of Appellant's brief when it overruled Appellant's Point of Error #1, said sub point addresses the need to prove relevance and materiality in seeking discovery. Wooten v American Motorist Ins. Co. 570 SW2d 572. (p-63).

* * * *

Application for Writ of Error

To the Honorable Supreme Court:

Now comes LEARY COX, Petitioner, before this court Appellant and Defendant in the courts below and presents this

preview to correct, redirect, add and refute the misrepresentations, omissions, false statements and biases appearing in the preamble of the Court of Appeals opinion.

On June 24, 1988 the Association filed a groundless lawsuit alleging Mr. Cox' cars to be inoperable because they carried expired license plates and inspection stickers and in such condition violated the deed restriction (TR-1) (TR-10). On July 29, 1988, Mr. Cox answered by verified special exception 1st Supplemental Transcript (1st STR-1) and on August 10, 1988 Petitioner filed a counter claim alleging selectivity and discrimination in enforcing the deed restriction (TR-15). On August 18, 1988 and October 12, 1988 the Association requested by letter and under pretense of discovery that Mr. Cox assist in determining if the Association

had a cause of action by setting up convenient times to allow the Association to start his vehicles. (This document pages 16 through 19). On December 12, 1988 the Association filed a motion seeking sanctions and order to compel inspection at the same time. The Association's letters were of general nature and did not comply with Rule 167(1)c, a mandatory requirement for a proper request for inspection and were not attached to the Association's motion (page 16 this document). On January 9, 1989, Defendant Cox filed a motion to postpone the hearing on Plaintiff's motion until a proper request was served (TR-49) and filed his response January 10, 1989 (TR-57) in which he complained that a proper request was not served and the letters he received which the Association called Exhibits "A" and "C" were not discovery request. He <u>did not say</u> any let-

ters or exhibits were attached to the Association's motion. On January 16, 1989, the 61st Court signed the order in chamber (TR-66) without notice to or appearance by Defendant Cox. The order made no specific requirement except to "allow inspection," in effect, a blank order permitting the search for a cause of action. On January 16, 1989, the Association appeared at Mr. Cox' residence and requested keys to his vehicles. This was not ordered by the court and no keys were presented. See affidavit by Ashna Campbell (TR-753). On February 1, 1989, Mr. Cox paid the Association $200.00 as was ordered. On February 13, 1989, the Association filed a second motion identical to the first; it, too, was granted on February 27, 1989, ordering an identical inspection March 31, 1989 (TR-114). On their arrival, the Association requested

keys to petitioner's vehicles and were refused as not being part of the court order. On June 1, 1989 Mr. Cox served a request for production (TR-158) and sought to inspect the records of the Association in accordance with Article XV of the Association's bylaws (TR-315) Texas Non-Profit Corporation Act (TR-317) and Rule 166 T.R.C.P. The Association refused and on July 11, 1989 Defendant Cox filed a motion to compel which was granted July 27, 1989 (TR-203) ordering production twenty days later on August 16, 1989 and ordering delivery to the court documents to be received in camera. On August 9, 1989 the Association requested Mr. Cox to inspect the records seven days before the date ordered by the court. Mr. Cox arrived at Mrs. Tolleson's residence to find disarranged and incomplete records in an abandoned kitchen cabinet located in an out-

side dirty and unkempt garage. Mrs. Tolleson, president of Boudreaux Civic Association, had no knowledge of the order or content she purported to be records, and had appointed her husband, Kim Tolleson, who is an attorney, to supervise the inspection at a fee of $200.00 a day while on vacation. No provisions were made to produce the records. This was a sham to bill the Association for attorney's fees. Mr. Cox made no statement regarding sufficient notice to begin his inspection which was not authorized until 20 days after the order was signed. He agreed to commence inspection on August 16, 1989 through September 5, 1989 (TR-281) in the presence of Kim Tolleson. On August 10, 1989 Mrs. Tolleson altered the schedule (TR-281) eliminating some agreed upon days and changing the times of those remaining unaltered. Mr. Cox visited on days which

were still compatible as agreed. The records were not produced and Petitioner filed a motion on October 16, 1989 for contempt and motion to extend discovery (TR-277). The motion was to be heard September 8, 1989. Three days before the scheduled hearing on September 5, 1989, the Association filed motion to recuse Judge Shearn Smith of the 61st District Court (TR-286) contrary to Rule 18a T.R.C.P. The judge improperly recused himself on September 8, 1989 (TR-327). The case was transferred to the 80th District Court. Judge Powell denied Mr. Cox' motion (TR-425) for a review of the document ruled "privileged" by the 61st Court. Judge Powell also denied Mr. Cox's motion (TR-337) (TR-340) for sanction against the Association for its untimely and delay motion to recuse Judge Smith. The sanctions were denied November 3, 1989. On

November 17, 1989 Judge Powell granted the Association's motion for summary judgement when there existed issues of material facts which should preclude such award. The court ruled that a cause of action which materialized in 1985 could be presented in 1983 as a counterclaim and that petitioners counterclaims were barred by res judicata, collateral estoppel and statute of limitation. (TR-434 & 486). (TR-363) At this hearing Judge Powell ordered Mr. Cox to go get a lawyer or lose his house, a blatant display of bias and prejudice contrary to Rule 7 and Rule 18b (1989). On November 20, 1989 Mr. Cox presented his motion for contempt (TR-329) against Mrs. Tolleson and the Association. Judge Powell flatly refused to hear the motion and stated he was not about to waste his time or anyone else's. And again ordered Mr. Cox to "go get a law-

yer." It was apparent that Judge Powell was biased and prejudiced against a pro-se litigant and could not conduct an impartial trial in the case. On December 15, 1989 the Association presented Judge Powell with a motion for sanctions alleging that Mr. Cox had failed to comply with two previous orders to allow inspection of his cars, that he harassed the Association by seeking to exercise a statutory right, that he changed the schedule to inspect the record and failed to do so when called and that he filed frivolous motion and responses, all of which are untrue, but palatable to a biased judge. Further, that Mr. Cox failed to appear for a deposition on three day's notice even though the Association's attorney was notified no hearing was conducted and the Judge signed the order in chambers on January 5, 1990, (TR-549) striking Mr. Cox' pleading enter-

ing a default judgement and awarding $5,500.00 in attorney's fees for abuse of discovery.

On February 9, 1990 Mr. Cox filed a motion to recuse Judge Powell (TR-691). The motion was denied February 26, 1990 by Judge P. Reiter who sat at the hearing. At trial the court found no violation of the deed restriction, no civil damages, but awarded the Association a permanent injunction and $22,000.00 in attorney's fees (S.O.F. pages 64 & 65). On appeal, the Court of Appeals made no findings of its own, but affirmed the trial court's judgement in all respects adding that Appellant Cox had failed to bring sufficient records to show error, giving rise to this application for writ of error. The motion is the controlling instrument employed to move a court to action. Exhibits are optional and supplemental and

by themselves cannot move the court. They are of less importance when their content is transcribed into the body of the motion. The Court of Appeals erred in holding that the absence of the letter rendered the record incomplete.

ARGUMENTS AND AUTHORITIES

Assignment of Error #1

The Trial Court erred when it failed to dismiss a groundless lawsuit with evidence on the petition as having no basis in fact or in law and was answered by special Exception.

On June 24, 1988 the Association filed a suit against Petitioner Leary Cox, Defendant and Appellant in the lower courts alleging deed restriction violation, specifically that he maintained "inoperable cars" on his property, without any measure of test or verification prior to the filing of this suit. And subse-

quently failed to submit any probative fact or demonstrative evidence that would support or give credence to a genuine cause of action. The plaintiff's petition (TR-2) identifies Appellant's cars by color, make, model year and license plate number and noted that the plates did expire; however, lacks any recital of fact which would give rise to a cause of action or state a claim upon which relief can be granted. DeLaGarza v Ryals 2d854 (Texas Civ. Appeals, Fort Worth 1951 writ ref'd n.r.e.). In the absence of adequate and sufficient facts or statements that if proven true would justify the allegation, there is no cause of action and nonetheless the Association prosecuted this suit by diverting the attention of the trial court away from the lack of merit in this cause and towards a series of ludicrous and improper sanctions under the discovery

provisions of Texas Rules of Civil Procedure (T.R.C.P.) The trial court issued three orders for sanction, all of which are improper, and a default judgement that is fundamentally contrary to the provisions of law. A plaintiff may not sustain a favorable judgement on an unpleaded cause. Oil Field Haulers Association v Railroad Commission, 381 SW2d 183, 191 (Tex. 1964). But the Plaintiff in this case must offer evidence and prove his case as in judgement issued upon trial. Frymire Engineering Co., Inc. v Grantham 524 SW2d 680 (Tex. 1975). The Defendant took special exception in his answer (1st Supplemental Transcript p 1) to Plaintiff's allegations thus increasing the demand and the burden that such allegations be proven by the Plaintiff. No such proof appeared in the petition or presented at trial. The final judgement entered

by the trial court is therefore improper and should be reversed. In order to sustain a default judgement it is essential that the petition show good cause. Griswold v Carlson, 249 SW2d (Tex. 58,60). A default judgement must be in accord with the pleadings. Mullens v Roberts, 423 SW2d (576 Tex. 1978). Further, a default judgement not supported by the pleadings is fundamentally erroneous. City of Fort Worth v Gause, 101 SWd 221 (Texas 1937).

In their petition (TR-2 Vol. I) the Association complained that Petitioner Cox violated the deed restrictions (TR-20 Vol. I) because he maintained inoperable cars on his property. This allegation was made prior to and documented October 5, 1987 and October 29, 1987 without any basis in fact which the association admits in its letter dated April 11, 1987. (TR-163 Vol. I). The letter is incorrectly

dated and should read April 11, 1988. The letter makes no mention that Petitioner's house was under construction, but reveals that the Association had no knowledge of the condition of Petitioner Cox' vehicles, yet they brought a groundless suit against Cox with reference to expired license and inspection stickers. Factors which bear no relevancy to operability and are outside the jurisdiction of Boudreaux Civic Association tractors, backhoes, forklifts, multiple terrain vehicles and stack cars are all operable without a current licenses or inspection stickers, and, in fact, are not required. The Association failed to plead a cause of action, the only measure of operability is a test of operability and no such test was conducted prior to the suit. The suit was brought on an assumption. Under burden of Petitioner's special exception the Association could

not prevail and the trial court should have dismissed the case. As the evidence at trial indicates the Association did not inspect the cars for operability, see statement of facts (S.O.F. p 31 lines 19-24) so the Association assumed inoperable condition then filed a groundless lawsuit (S.O.F. p 22 lines 17-23). Rather than withdraw its suit the Association chose to use sanctions as a means to prevail. The Association should not prevail where the petition shows no good cause. A default judgement in such instance is unjust.

The deed restriction requires that a car be inoperable, not assumed to be inoperable. (TR-20 paragraph 6). In Frymire Engineering the court held that the plaintiff was not entitled to judgement and could not recover without proof that Defendant installed wiring upon which plaintiff's negligence suit was made. In

this case the Plaintiff also fails to show good cause to prevail and the suit should have been dismissed. To do otherwise would authorize a party to file a blatantly fictitious and groundless suit and pursue same solely on sanctions as a means to prevail. Where there is no merit to a suit, the plaintiff should not recover on sanctions. The trial court erred by its failure to dismiss a groundless suit.

Assignment of Error #1(a)

The Court of Appeals erred in overruling Appellant's first and second points of error by concluding that the record on appeal was incomplete without evidence to support its conclusion.

On December 12, 1988 the Association filed a motion in the 61st District Court seeking sanctions against Leary Cox for failure to allow inspection of property. Under the discovery rule 167.1(c) of Texas

Rules of Civil Procedure the Association was obligated to submit a proper request to Leary Cox, specifying a reasonable time, place and manner for making the inspection. There is no such request in the records. Neither was there any request presented to the trial court which could form the basis of an order for sanction. Since there was not a proper request Leary Cox did not omit or commit any act deserving of sanctions. Further, there was no prior court order to support the Court's sanctions. On January 10, 1989 Appellant responded (TR-57) and objected to the Association's motion for sanctions and stated therein that the Association had not presented a proper request for inspection or for purposes of awarding sanctions under Rule 215.3(c), (d), T.R.C.P. Rule 167.1(c) reads in part: "...the request shall specify a reasonable

time, place and manner for making the inspection and performing the related acts." The Plaintiff failed to comply with the mandatory requirements and should be precluded from obtaining sanctions. A valid request should contain all the elements of a request as set out in Rule 161.1(c). Neither the Plaintiff's letter of August 18, 1988, their motion or the signed order on January 16, 1989 expresses the manner of the inspection. If Plaintiff's letter be considered a request it is deficient and void. And cannot form the basis for the trial court's order.

Insofar as the Plaintiff's motion seeks an order for inspection of Defendant's cars, the Association fails to plead and prove the relevance and materiality of such inspection or otherwise show good cause in the furtherance of Plaintiff's suit. Crane v Tunks, 328 SW2d, 434 (Tex. 1959). The

Association previously made a determination that Defendant's automobiles were inoperable and an inspection without qualification or an expression of manner would not produce any evidence beyond that established prior to the institution of this suit but permit the Association to use the discovery process as a "fishing excursion," Texhoma Stores Inc. v American Central Insurance Co., 424 SW2d, 466 (Tex.Civ.App.-1968) writ ref. n.r.e. It is difficult to ascertain what acts or set of facts do justify the trial court's order of January 16, 1989 awarding sanctions against the Defendant and ordering inspection of property. The trial court's ruling is in error and should be reversed.

Assume momentarily that the Association was entitled to an inspection subsequent to initiating this suit only one of two determinations could be made; that is

the cars are (1) operable, or (2) inoperable. If the determination was that the cars are operable the Association would be obligated to withdraw its suit. If the results of discovery directs a party to pursue or withdraw a cause, the discovery exercise is no longer one in search of supporting evidence but one in search of a cause of action. Rule 215.2(b) provides that sanctions may be imposed only "...if a party...fails to comply with proper discovery requests or to obey an order to provide or permit discovery." A proper request is defined in Rule 161.1(C) as having three elements, a statement of time, place and manner. The Defendant was not under any court order prior to the order for sanction. Therefore the trial court's order is premature, without foundation and contrary to law. In such instances, the trial court has exceeded its

authority, in fact had no authority to make such order. No failure has occurred if no proper request was served on Appellant. It is generally accepted that a court's failure to observe a mandatory provision will render its judgement or order void. Cline v Niblo, 8 SW2d, 633 (Texas 1928). Gayle v Alexander 75 SW2d, 706 (Tex.Civ.App.-Waco 1934).

The trial court abused its discretion when on January 16,1989 it simultaneously awarded sanctions for failure to allow inspection of property in the absence of a valid request and then issued an order compelling inspection of the property. The better approach would be to first issue an order compelling inspection and upon failure to comply, sanctions would then be appropriate. "A trial court abuses discretion when it reaches a decision so arbitrary and unreasonable as to amount to

a clear and prejudicial error of law." King v Guerra, 1 SW2d, 373, 376 (Tex.Civ.-App.-1927). Bush v Vela, 535, SW2d, 803,-805 (Tex.Civ.App.-Corpus Christi - 1976).

The office of imposing sanction is to seek compliance. In this case there was nothing to comply with. There was no order prior to the imposition of sanctions and there was not a proper request tendered. Where there is no obligation to comply, there can be no failure to comply as set out in T.R.O.C.P. Rule 215. The award of sanction is premature and invalid, until some failure to permit discovery has occurred. In overruling Appellant's first and second points of error the court's opinion (page 8) concludes in error that Appellant's records were incomplete and that the Association had attached exhibits to motion which were proper requests. In fact, no exhibits were at-

tached to the Association's motion and their absence from the record does not render the record incomplete since they were never presented to the trial court. Their absence further preserves the condition at the time the trial court improperly granted sanctions against the Appellant. Only records on file before the trial court will become part of the record on appeal. See TXXN, Inc. v D/FW Steel Company 632 SW2d, 706 (Civ.App.-1982). Where letters in transcript on appeal were not part of the pleading and were not introduced through any other proceeding leading to default judgement the letters were not part of the record on appeal and could not be considered by the reviewing court. There is no evidence to show that the letters were exhibits as part of the trial court's record. No exhibits were attached to the Association's motion which

made the record before the Court of Appeals complete as they were when the trial court made its order. The Appellant should not be required to bring records on appeal which were not presented to the lower court. If the Association did attach and file exhibits with its motion, Rule 75(6) T.R.C.P. provides that exhibits tendered and admitted shall remain in the custody of the Clerk of the Court at all times, thus assuring the safety of these documents and they would be part of the record on appeal. It is inconceivable that the Association's motion survived the custody of the Clerk of the Court and only the exhibits which were allegedly attached escaped without evidence of their existence as part of the motion. Further, the Association failed to challenge Appellant's statement "...that there was no such request in the record,"..."neither

was there any request presented to the trial court which could form the basis of an order for sanction." (Page 3, lines 6,7,8 Appellant's brief). See State Banking Board v Valley National Bank 604 SW2d, 415, 419 (Civ.App.-1980). The Austin court held that, "...exhibit must be admitted into evidence at the hearing...in order to become a part of the record on appeal." There is no evidence of probative force to support the court's conclusion.

Assignment of Error #1(b)

The Court of Appeals erred when it overruled Appellant's first and second points of error when it considered by presumption exhibits which were not part of, and could not be a part of the record on appeal by virtue of fact that said exhibits were not part of the trial court's records.

The Court of Appeals is in error by

concluding the exhibits which were no part of the trial court's record to be "...proper discovery request." (Opinion p 8). It is well established law that only exhibits submitted and admitted into evidence at a trial, hearing or other proceeding by the trial court will become part of the record on appeal. The Association neglected to present their exhibits for consideration. Further, the request for discovery constitutes a prerequisite for the granting of sanction. And except it is proven that the Association's exhibits were attached to the motion and considered by the trial court, the Court of Appeals may not consider them "proper discovery request" because this is a mandatory requirement upon which sanctions are based, a mere presumption is inadequate to support sanction of a default judgement. The court elected to consider

the alleged exhibits and determined that they were proper requests conforming to mandatory provision requiring a statement of reasonable time, place and manner. The Court of Appeals has assumed that the trial court saw the letter but refers to no supporting fact. The court is in error. the court should consider on what is properly before it. "Where an essential link in the proof of dedication was a map of a subdivision and there was no indication that map was introduced into evidence at trial, a copy of the subdivision was not part of the record and could not be considered." City of Mission v Popplewell 295 SW2d, 712 (Texas-1956).

Assignment of Error #1(c)

The Court of Appeals erred in its opinion that the Appellant is under burden to present exhibits as part of the record on appeal, when such exhibits were not sub-

mitted or admitted as evidence or formed any part of the trial court's records.

In overruling Appellant's first and second points of error the Court of Appeals held that under Rule 50(d) of Tex. R. App. P. the Appellant is under burden to present sufficient records to show error and that letters which the Association claims were exhibits but not attached to their motion for consideration by the trial court, were under the duty of Appellant to be presented on appeal. As stated before, and hereinafter, the Association failed to attach any exhibits to their motion and as such no exhibits were presented to the trial court and therefore Appellant was under no duty to bring exhibits that were outside the trial court's records. See Garza v Levin 769 SW2d, 644 (Civ.App.-1989) "...the appellate court may only consider evidence on file before

the trial court at the time of hearing which gave rise to the appealed from order." Rule 50(b) of Tex.R.App.P. is not applicable in instances where documents are not part of the trial court records.

The Appellant has discharged his burden by presenting appropriate and sufficient records, in fact all the records appearing before the trial court in excess of 800 pages. On June 18, 1990, Appellant filed a request for transcript (TR-795) in the Clerk of the Court's office and listed ninety-seven items. Item number seven (#7) lists Plaintiff's motion for sanction for failure to allow inspection of property. On July 27, 1990 the Clerk of the Court certified the request (TR-836) and indexed the Association's motion to be located in the transcript at (TR 45-46). No exhibits were attached as was the case then and now. Appellant is not and should

not be held responsible for their failure to attach their exhibits to their motion. The absence of which magnifies the impropriety of the trial court's order granting sanction. In reversing a default judgement against a Defendant the Court of Appeals states that "when a reviewing court is called upon to revise ruling of a trial court such reviewing court must do so on record before the trial court when the ruling was made, and a party is not permitted to try a case on appeal on different statements of facts than that presented to the trial court." Grapevine Trucking Inc. v Shepherd 366 SW2d, 950 (Civ.App.-Fort Worth-1963) ref. n.r.e.

Assignment of Error #2

The Court of Appeals erred in overruling Appellant's first and second points of error on the basis that insufficient record was brought forward to show error,

when the record shows otherwise.

In reviewing Appellant's first and second points of error, the Court of Appeals refers to the Association's letters to Appellant that it asserted were request for inspection and that these letters were attached as exhibits to the Association's motion. Also that the Appellant had failed to bring these letters purporting to be "request" as part of the record for review. There were no exhibits attached to the Association's motion although the letters were described and designated as exhibits within the body of appellee's motion, none was attached to it or presented to the trial court. The Appellant stated this on page 3 of his brief addressing his first point of error. See Appellant's brief (p-3).

So far the Appellant has brought a complete and sufficient record to show

error. As set out below, the Appellant requested Plaintiff's motion for sanction for failure to allow inspection of property as item No.7 appearing at (TR-795). The Clerk of the Court's certificate of delivery (TR-836) identifies it at (TR-45) and as stated in his brief, it contained no exhibits or letters or request for inspection. The trial court nonetheless granted sanction from which this appeal originates. The Court of Appeals is in error in concluding that the record before it is incomplete to show reversible error and that it must engage every reasonable presumption to be in favor of the trial court's ruling. The Association's motion (TR-45) contains enough evidence to sustain Appellant's points of error. In the absence of appellee exhibits their motion should be reviewed. Smith v Southern Land Development, 385 SW2 558, Houston, Texas

1964. The court has failed to take note that the Association affirmatively declared in their motion (TR-45) the content and nature of the letter of August 18, 1988 designated Exhibit "A" and the other of October 12, 1988 designated as Exhibit "C". In describing the content of Exhibit "A" the Association writes:

"By letter dated August 18, 1988, Plaintiff's counsel requested Defendant Cox to set up convenient times to allow inspection of the cars on the subject property."

A similar request was made in the letter of October 12, 1988 and is supported by the Association's complaint (TR-46) that...

"Despite Plaintiff's repeated request for defendant Cox to set up convenient times...Defendant has failed and refused and still fails and refuses to allow such

inspection." (See pages 13a, 13b, 13c and 13d).

In their brief (Page 8) the Association claims both letters constituted the basis of their request but they were never presented to the trial court and no reference is made to any other document. The Association authored (wrote) both the letters and the motion. And in the motion describes the letters with sufficient detail of its content to show that the letters were defective as "proper discovery request" insofar as they requested Appellant (Cox) "...to set up convenient times." There is not a more credible source or a need to seek another reference. the Appellant is under no duty to set up times, determine the place or manner of inspection or obligated to do anything until a proper discovery request is served. The Association's own statement

confirms unequivocally Appellant's complaint that a proper request was never presented and supports his points of error one and two.

Under Rule 167(1)(c) the requesting party is mandated to submit a request containing all three elements. If that party delegates or imposes any of the required elements to another, as the Association has demonstrated, a proper request has not been executed or submitted by the requesting party. And, if served, is defective and cannot form the basis for sanction for failure to comply as the Association requested of the trial court. (TR-47).

"Because of Defendant Cox' repeated refusal...sanctions should be imposed against Defendant."

The trial court erred when it granted sanctions (TR-66) against the Appel-

lant, denied his objection made in Defendant's Response to Plaintiff's Motion for Sanction for Failure to Allow Inspection. (TR-57). See Defendant's Response to Plaintiff's Motion for Discovery Inspection (TR-60). With this much evidence on record before the Court of Appeals it should have reconsidered its opinion that sufficient record was not brought forward, to show reversible error. The record shows that Appellant was diligent in bringing sufficient records for review (TR-795) Item #7 and (TR-836) index 45. If the Association's exhibits were attached to their motion they would be part of the record before the Court of Appeals. And their absence clearly attests to the fact that they were not. This Court should also note that the Association failed in their reply to Appellant's points of error one and two, to challenge Appellant's

statements that (1) the Association's discovery request was void of either a specification of time, place, or manner as required, and (2) that there was no such request in the records, meaning nor letters or exhibits. (Page 3 Appellant's brief), (3) "...that neither was there any request presented to the trial court." Under Rule 419, Texas Rules of Appellate Procedure:

"Any statement made by Appellant in his original brief as to the facts or record may be accepted as correct unless challenged by opposing party."

J. C. Biscamp v Zeno Carpet Co. 473 SW2d, 218 (Civ.App.-Beaumont-1971) also Bond v Bond 547 SW2d, 43, (Civ.App.-Eastland-1977).

There is evidence that the trial court did not see any letters of request as exhibits and there is evidence that

letters sent to Appellant "as request" are improper by admission in the Association's motion. Further, if the Court of Appeals accepted the Association's statement that their exhibit was attached to the motion, the court should also accept with equal value, their statement that the letters requested Appellant to set up times for inspection, contrary to the mandatory requirement of Rule 167(1)(c). The record is sufficient to show reversible error.

In Smith v Southland Development the Court of Appeals in Houston engaged in an examination of the record for evidence of the content of a letter which was referred to by Appellant but not made part of the record. Pages 557-558. The court stated "...that there was nothing to show the content of such letter..." In announcing the result of the examination the Court confirms its duty to use the available

record to support its judgement. The same Court of Appeals in Houston in this case has failed to examine the record before it for evidence of the content of the letter referred to in this appeal, but which are not part of the record. When the record (TR-45) clearly shows the content of the letters. The Court of Appeals has arbitrarily exercised a presumption which is a complete "turn about" in the face of probative evidence. To support that presumption the Court of Appeals must also assume the following: (1) that the letters were attached to the Association's motion, (2) that the letters were tendered and admitted, (3) that the letters were examined by the trial court, and (4) that the letters conform to the mandatory provisions for a proper request under Rule 167(1)c T.R.C.P. Surely this is inconsistent at best and a laborious undertaking when the Court of

Appeals presumes the letters to be "proper request." This conduct is discriminatory.

The trial court's award of sanction is improper from any point of view. Since the trial court did not see the letters, which is Petitioner's position the court was without authority to award sanction and such sanctions are improper. If the trial court did see, admit, exercise and award sanctions based on the letters as proper request, which is the Court of Appeals presumption, the sanctions are improper because the record (TR-45) reveals no proper request was executed or served by the Association. The letters are included here for review by the Supreme Court on condition that if they contain any information of material significance that is not already in the record and will prejudice the Association, they will not be considered in deciding

this case. However, if there is information of material significance that is already in the record, no harm will befall the Association since that information or evidence will be considered from the record. (TR-45 & 46) shows the Association requesting Mr. Cox to set up times for discovery and (TR-163) shows that the Association had no knowledge of the condition of the vehicles they alleged were inoperable. Plaintiff's exhibits (p-9) reveals that petitioner's vehicles were operating on his property but the Association believed they may be inoperable--because of the expired licenses and inspection permits (See p 9 entry dated November 22, 1987). The letters of themselves are of less significance when all the evidence is already a part of the record. The Court of Appeals is in error in holding that insufficient records were

brought forward for review and that it must engage a presumption the Court's judgement should be reversed.

Note: See letters from Boudreaux Civic Association, Inc. attorney - pages 321 through 326.

Assignment of Error #3

The Court of Appeals erred in its interpretation of the trial court's order of January 16 and February 27, 1989 and is in error by overruling Appellant's third point of error.

On January 20, 1989 the Association and agents entered Defendant's property and conducted an inspection as ordered by the 61st Court on January 16, 1989. And further sought to obtain keys to Defendant's automobiles. This requirement was not part of the court's order and Defendant refused to exceed the provisions in the court's order. On February 1, 1989

Plaintiff filed a second motion for sanctions (TR-68) complaining that Defendant had failed to comply with the first order. The more accurate complaint would be that Defendant failed to exceed the provisions of a void and improper court order.

Paragraph #3 of Brenda Tolleson's affidavit dated February 8, 1989 and included in Plaintiff's second motion for sanctions (TR-74) reads, "Defendant, Leary Cox did not appear for said inspection and did not make any arrangement for the mechanic to inspect the cars in question. The cars were parked behind the back of Defendant Cox' residence and were locked. Defendant Cox did not leave keys for the vehicles. The mechanic was unable to look inside the vehicles, open the hood of the vehicles or otherwise attempt to <u>start the vehicles to see if they were in operating condition</u>."

The court should be informed that Defendant's property is an open lot, unfenced and without gates or other obstruction to entry and further refer this court to the affidavit of Ashna Campbell (TR-753). The court order of January 16, 1989 had two provisions: (1) that Defendant allow inspection; (2) that Defendant pays $200.00 to Plaintiff within ten days. No other requirement. Both conditions were satisfied as set out in Defendant's motion to deny Plaintiff's second motion for sanction (TR-85). "Essentially this Court has determined that discovery orders should not exceed the intended scope expressed by the requesting party, General Motors v Lawrence, 651 SW2d, 732 (Tex. 1983).

In spite of the Associations exaggerated demands they made no effort to include them in their second motion for

sanction which they filed February 14, 1989 and was granted February 27, 1989 (TR-114). This second order for sanction was substantially the same as the first and again granted without just cause and is improper because no violation of the first order occurred and that the first order was itself void and improper. The alleged violation of which forms the basis of the second order.

On March 31, 1989 the Association entered Defendant's property for an inspection as ordered by the court on February 27, 1989. The Association requested keys to Defendant's cars and was denied by the Defendant as no such provision was contained in the court's order.

On December 15, 1989, ten months after the signing of the second order, the Plaintiff presented a third motion for sanctions (TR-525) "inter alia" to the

80th District Court to which this cause was assigned upon the Plaintiff's motion to recuse Judge Smith of the 61st Court. And again stated that Defendant had failed to comply with the order issued by the 61st Court on January 16, and February 27, 1989. By all appearances the Association had abandoned their efforts to determine a cause of action under the misnomer of an "inspection." And since March 31, 1989 made no move to obtain further discovery regarding Defendant's cars. Both orders were disposed of in the 61st Court by operation of law when no further relief was sought by the Plaintiff between March 31, 1989 and December 15, 1989 (318 days). (The intervening events are presented later). Upon submission of Plaintiff's third motion for sanction Judge Powell struck Defendant's pleading and entered a default judgement in favor of the Associa-

tion on January 5, 1990. The Association made no request to continue discovery or for an order to compel, or any order whatsoever in the 80th District Court which would form the basis of a third motion and order for sanction pertinent to discovery. Since there were no valid or current orders before or issued by the 80th District Court the entry of sanctions as severe as a default judgement is arbitrary, capricious, without just cause and constitutes an abuse of discretion.

Under the facts herein such a ruling by Judge Powell sets this case apart. By striking Defendant's pleading and granting a default judgement in the absence of a proper request for discovery, no showing of good cause, relevance or materiality or a valid current court order compelling a specific performance or a factual showing of a refusal or failure to comply with the

statement of a court order in this cause demonstrates peculiar irregularities and a gross injustice. In every case where a default has been entered against a party for failure to comply with discovery orders. Such orders were issued by the court rendering such judgement. See Henson v Citizens Bank of Irving, 549 SW2d 446 (Tex.Civ.App.-1977) no writ. Barrientos v Texas Employment Insurance, 507 SW2d 900 (Civ.App.-1974). Rainwater v Haddox, 544 SW2d 729 (Tex.Civ.App.-1976).

It should be noted again that the Defendant neither refused or failed to comply with any court order. But that the Association requested that the Defendant exceed the order of the court. This is significantly different from a failure to comply as cited. In fact, it is a failure to exceed a court order for which no sanctions are prescribed and no misconduct

engaged. (General Motors v Lawrence. Default judgement under rule 215 should be used sparingly Pohl and Hittner Judgement by Default 37 S.W.L.J., 33, June 1933) and only when clearly authorized. In those cases where the striking of a pleading has been upheld the fact situations are uniformly more egregious than this case. Only the most deliberate of circumstances would warrant a default judgement. In Rainwater v Haddox the trial court rendered a default judgement only when Defendant failed to answer interrogatories after five months and ignored an order to compel answers for two and a half weeks. In City of Houston v Arney 680 SW2d 867, 870, (Tex.Civ.App.-1980) no writ, the City's pleading was struck and default judgement entered after the City failed to answer interrogatories and ignored an order to compel answers for nine weeks

after due date and then failed to appear for a hearing on sanctions. Rule 215 authorizes the trial court to impose sanctions and to make orders in regard to a party's failure to comply with discovery, - as are just. When no failure to comply has occurred, no sanction should be imposed. Any other action is unauthorized, and unjust and cumulative of an abuse of discretion. In overruling Appellant's third point of error the Court of Appeals erred by directing its attention to the meaning of the word "inspection" rather than an investigation into the context and clarity of the order to adequately inform the Appellant, without inferences, as to what he is required to do. The meaning of the word inspection is not at issue, the direction or instruction in the order is at issue and is the fundamental complaint in Appellant's third point of error.

Assume the order (TR-66) was proper for the purpose of awarding sanctions, it could also be void for incompleteness or ambiguity or too vague to be a directive, which would justify a party's failure to comply.

The Court of Appeals has incorrectly attributed an "absurd" interpretation, by its own definition, to Appellant (opinion p 9) when in fact the Appellant made no interpretation at all regarding exterior or interior inspection, unlocking of the cars or presentation of keys; this information is imputed by the court. The order (TR-66) does not contain any of the conditions inferred by the court. By contrast, if the order was properly constructed this interpretation would not be necessary. The court is in error in holding that "...therefore the Appellant did violate the first order." (Court of Appeals Opin-

ion - page 9), when such instruction is not in the order. For a party to be held in violation of a court order the order must specify details of compliance in language clear and unambiguous.

The trial court's order imposed two conditions, the one being that the Appellant pay $200.00 to Plaintiff. This is clear and unambiguous instruction requiring no interpretation, and was complied with. The second condition ordered Appellant to "allow" the Association to inspect cars on his property. The order did not require him to "assist" or be present, neither did it specify the purpose of the inspection or what conditions should be ascertained; and the absence of such material factors renders the order vague and incomplete to adequately inform the Appellant of his obligation beyond providing access to the property and opportunity to

inspect. The Texas Supreme Court in a 1967 habeas corpus proceeding laid down the requirements of a valid enforceable order. Ex Parte Slavin 412 SW2d, 43 (Texas Supreme Court-1967). "For a person to be held in (contempt) violation of a court decree, the decree must spell out details of compliance in clear, specific and unambiguous terms so that the person will readily know exactly what duties or obligations are imposed on him." Texas decisions hold that an order of the court "...must be definite, clear and precise as possible and when practicable it should inform the Defendant of the acts he is restrained from doing (or obligated to do) without calling on him for inferences or conclusions about which (other) persons might well differ and without leaving anything for further hearing." San Antonio Bar Assn v Guardian Abstract & Title

Co. 291 SW2d, 697 (Texas Supreme Court-1956).

The Court of Appeals in its opinion affirming the trial court's second finding of fact stated that "both the first and second orders for sanction instructed the Appellant to allow a complete, including a mechanical inspection of the cars." (Opinion page 17). This is simply not so and reference to each order (TR-66) and (TR-114) will show the court to have misrepresented the content of the orders. Neither did the orders instruct the Appellant to provide keys or unlock the cars (Opinion page 9). The Appellant should not be sanctioned for failure to do what was not ordered. In Ex Parte Roy A. Lee, 704 SW2d, 15, (Tex. 1986) this Supreme Court found that Lee was ordered only to produce documents, not to answer interrogatories and ordered him released on con-

tempt charges. Additionally the Association had the opportunity on February 14, 1989 to revise their order and include a specific demand for a demonstration of operability, but this would be ascertaining a cause of action rather than a search for supporting evidence and would likely alert the trial court. The Association chose not to modify the order. As set out before, the Association had not established Mr. Cox' vehicles to be inoperable and in fact had no cause of action. Both the motion and the orders were designed and intended to obtain the opportunity to determine if the Association had a cause of action and to use the discovery provision to achieve that goal. To this end, the manner of inspection and the objective of the inspection were eliminated from both the Association's motions and orders. That they may pass the trial court's at-

tention without alarm. Remember also that the letters referred to as exhibits requesting permission to start Mr. Cox' cars were not attached to the motion further increasing the chances of the trial court overlooking the potential to misuse the discovery order. If the motion on the order had disclosed the Association's intent to start Mr. Cox' vehicles as set out in the letter of October 12, 1988, or if the letter was attached to the motion, the Association's motion would be denied as seeking to determine a cause of action. The lack of specificity in the motion and order which allowed it to be signed is the same factor, the absence of which makes the order vague and incomplete. The motion should have been denied. Additionally, the Association's motion failed to plead any issue of relevance or materiality. Considering that the lawsuit was

already filed and the Association already decided the vehicles were inoperable, the sole purpose of the inspection was to ascertain operability. Mr. Cox was not required to comply with any request not made a part of the order. The Court of Appeals affirmed the trial court's sanction without making a proper interpretation of the trial court's orders and should be reversed.

Assignment of Error #4

The Court of Appeals has misplaced the law regarding non-profit corporations and a commercial for-profit corporation in overruling Appellant's point of error number four.

On August 10, 1988 Defendant brought a counter claim (TR-15) against the Plaintiff alleging selectivity and discrimination in enforcing the deed restriction. In accordance with Rule 166b the Defendant

requested production of documents on June 5, 1989, (TR-158). The Plaintiff sought protection under attorney-client and work product privileges (TR-164). The Plaintiff failed to respond to Defendant's request for production and upon Defendant's motion to compel production. Judge Smith conducted an "in camera" inspection and on August 30, 1989 signed an order (TR-207) denying discovery of some documents. The court's ruling is in error. The Defendant is a member of the Boudreaux Civic Association and has a statutory right to inspect the records of the Association as set out in (TR-593) Article XV of the bylaws of the Boudreaux Civic Association which states that "the books, records and papers of the corporation shall at all times, during reasonable business hours, be subject to inspection by any member." Texas Non-Profit Corpora-

tion Act Article 1396.2. 23(b) (TR-592) provides that "all books and records of a corporation may be inspected by any member..." As a matter of law the Plaintiff is not entitled to such an exclusion when the material sought in relation to the activity of Boudreaux Civic Association is a statutory right. Additionally, no document is protected from discovery when the purpose of such is in support and the determination of allegations of misconduct on the part of officers and board members. Texas Society v Fort Bend Chapter, 590 SW2d, 156, (Tex.Civ.App.-1979) ref. n.r.e. All of the records of the Association, including those in possession of their attorney, Mr. Dillon, which in any way relates to his representation of Boudreaux Civic Association are open for inspection by any member.

As a result of Judge Smith's order,

the Defendant's stated right has been infringed and further impairs his ability to defend this suit and adequately pursue his counter claims. Such denial amounts to a clear abuse of discretion. This cause was transferred to the 80th District Court and a motion was presented to Judge Powell on November 3, 1989. Defendant's motion for a review of documents ruled privileged by Judge Smith (TR-425). The motion was denied on November 17, 1989. By such denial the court has allowed the Association, its officers and director to perpetrate inequity and injustice behind the corporate form; Gentry v Credit Plan Corp. of Houston, 528 SW2d 575 (Texas-1975) and destroy the timely effect of Defendant's discovery.

Under the provisions of the Texas Non-Profit Corporation Act, Tex. Rev. Civ. Stat. Article 1396.2.23(3) and the bylaws

of the Boudreaux Civic Association, Inc. (TR-593), every member has a statutory right to inspect the books and records at any reasonable time. Board of Directors of By the Sea Council v Sondock et al 644 SW2d, 744 (Civ.App.-1982) ref. n.r.e. No part of the Association's records are prohibited from inspection. The Court of Appeals is in error.

Assignment of Error #5

The Court of Appeals has erred in overruling Appellant's fifth point of error and has misplaced the fact that Judge Smith recused himself on an untimely motion to recuse and such order is reviewable on appeal.

Boudreaux Civic Association filed a motion on September 5, 1989 to recuse Judge Smith (TR-286) and failed to meet the mandatory filing requirements in its untimely presentation of their motion.

The Texas Rules of Civil Procedure Rule 18(a) provides that..."at least ten days before the date set for a trial or other hearing... any party may file...a motion.-..stating grounds why the judge before whom a case is pending should not sit in the case." The Association's motion was filed September 5, 1989, three days before the Defendant's scheduled hearing on September 8, 1989; Defendant's motion to extend discovery and to compel production on prescribed schedule (TR-284) of which they were notified August 31, 1989. The law is very well established and Plaintiff's motion should have been denied Limon v State 632 SW2d 812, 815 (Civ.App. Houston-1982); Autry v Autry 646 SW2d 586 (Civ.App. Tyler-1983); Gonzales v Gonzales 659 SW2d 900 (Civ.App. El Paso-1983). The rule states that a judge shall recuse himself or refer the motion when such a

motion is properly filed, meaning at least ten days before a trial or other hearing. Nothing in the rule authorizes the judge to recuse himself if the motion is untimely. In Limon v State the court found no error in the judge's denial of a motion to recuse which was urged less than the required ten days before a hearing. A similar holding appears in Gonzales v Gonzales. So far there appears to be no authority supporting Judge Smith's order to recuse himself. And his action constitutes an abuse of discretion. Further, the Association failed to state any grounds, legal or constitutional, as the basis for their motion. Or to present any substantive fact that would precipitate partiality or impropriety as Plaintiff's motion implied. Neither of personal bias, prejudice concerning subject matter or party or personal knowledge of the facts in conten-

tion are stated in Plaintiff's motion. But that there exists a "high probability" of the calling of Don Sheldon Smith to testify as a witness before his father. Don Smith is not a representing attorney, or party to this suit, Winston v Masterson 27 SW 768 (Tex.-1984). He has no personal knowledge of the facts before the 61st Court, and could only relate information reported to him in 1983 by Boudreaux Civic Association in his capacity as their attorney in a closed and separate suit. Under Rules #602 and #802 of the Texas Rules of Civil Evidence Don Smith could not testify in this cause. The matter of consanguinity, if considered, is irrelevant since such grounds are directed only to "parties," not witnesses. The immediate argument is presented in search of some overriding factor to justify Judge Smith's recusal of himself upon the filing

of an untimely motion to recuse, void of any mandatory allegation or adequate fact statement upon which to support such recusal. Again, the court's action exceeds its authority and has worked delay and injustice to the Defendant. See Cline v Niblo. The court's ruling is therefore in error. In overruling Appellant's point of error number eight, the court has failed to address the facts as the appear in the record. That the Association failed to meet the mandatory filing requirement by filing their motion to recuse Judge Smith (TR-286) on September 5, 1989, less than ten days before Defendant's scheduled hearing of his motion 318 (TR-284) on September 8, 1989 contrary to the provisions of Rule 18(a) of T.R.C.P. The record shows that the Association's motion was legally and factually insufficient to support the motion. The authority cited

by the court is factually different, District Judges v Commissioner's Court 677 SW2d, 743-745. An order of recusal is not reviewable if that order was issued by an assigned judge or the presiding judge of the administrative district as in the case of District Judges v Commissioner's Court. A third judge intervened, heard the motion on merits and disqualified Judge Holland from presiding over proceedings regarding his own orders. The facts are strikingly different and distinguishable. The Appellant's complaint is that Judge Smith recused himself contrary to rule when the motion was submitted less than ten (10) days before Appellant's motion was to be heard in violation of Rule 18(a) T.R.C.P. (1989). Because there was no intervening party to review the motion and order, Judge Smith's action is reviewable by the Court of Appeals and the Supreme Court.

Further, Judge Smith's action is contrary to Limon v State 632 SW2d, 812 815 (Civ.-App.-1982); Autry v Autry 646 SW2d, 597 Civ.App.-1983); Gonzales v Gonzales 659 SW2d, 900 (Civ.App.-1913). Unless a motion to recuse is timely filed the mandatory provision regarding hearing referral and recusal do not come into play. The Court of Appeals is therefore in error.

Assignment of Error #6

The Court of Appeals erred in overruling Appellant's sixth point of error by misplacing the law and concluding that Judge Smith's order is not reviewable and sanction cannot be granted.

On October 19, 1989 Defendant and Appellant presented a motion (TR-337) to the 80th District Court for sanctions against the Plaintiff for the untimely and delaying motion presented, without sufficient cause, to 61st District Court. Rule

18a(h) provides that the judge to whom the case is assigned may, upon the Defendant's motion and in the interest of justice, authorize sanction under Rule 215 2(b). As set out in Defendant's motion for sanctions and outlined in point of error #5, the Plaintiff's motion was untimely, without good cause, and solely for the purpose of delay and to upset the court's agenda. The Plaintiff was scheduled for a second hearing on September 8, 1989 on their failure to comply with Judge Smith's order of July 21, 1989 compelling production of books and records, and for an extension of the discovery period which was necessitated by the Association's refusal to produce the records for inspection in light that a Docket Control Order (TR-169) was signed June 29, 1989. Rather than face a second order to produce and face sanctions for failure to produce, the Association filed

an untimely motion for purposes of delay. Judge Powell having jurisdiction, the records and a motion for sanction denied the request of Defendant which is an abuse of discretion. The record clearly indicates a lack of sufficient cause and purpose for delay. And Defendant's motion should have been granted. The Court of Appeals had the duty and authority to render a proper order as justice would determine but failed to do so. Scott v Liebman 404 SW2d 288 (Texas 1966). Upon reversal of this cause Defendant should be awarded sanctions of $1,500.00 as should have been done by the trial court.

Judge Smith signed an order recusing himself on an untimely motion by the Association thus bypassing the authority of the assigned judge or the presiding judge to consider the motion and the propriety of the order. His order is therefore

reviewable on appeal. Since the Association's motion was untimely and was brought for purposes of delay, Rule 18(h) T.C.R.P. (1989) provides for sanctions as authorized by Rule 215(2)(b). This Supreme Court now has jurisdiction and the authority to make such ruling as should have been made by the lower court. District Judges v Commissioners Court is not controlling when the trial judge recuses himself on an untimely motion or on any order which bypasses the administrative judge. Judge Smith's recusal order is located at (TR-327). The Court of Appeals is therefore in error.

Assignment of Error #7

The Court of Appeals erred by misplacing the facts and the law when it overruled Appellant's seventh point of error on the premise that he could have raised his counter claims in the 1983 suits, when

such claims matured in 1985.

On October 23, 1989 Plaintiff filed a motion seeking partial summary judgement (TR-371) on issues raised in Defendant's counter claims (TR-374). In their motion the Association alleges that Appellant's counter claims were barred under theory of res judicata, collateral estoppel, and statute of limitation. In his response November 9, 1989 (TR-486) the Defendant stated that a cause of action may only be barred if that cause was previously adjudicated on the merits and there exists in the current suit all of the following: an identity of parties, issues, subject matter, relief sought and cause of action as to matters raised or could have been raised. Franklin v Rainey 556 SW2d 583 (Civ.App.-Dallas 1977). Except for the parties all other factors are dissimilar. Further, no issue of Defendant's counter

claims were raised or could have been raised in the prior suit until there were facts and tangible proof of such probative value to support a cause of action. A cause of action comprises both the existence of a right and facts sufficient to constitute a claim for relief. Linken Hoger v American Fidelity 260 SW2d, 884, 886 (Texas Supreme-1953) quoting Williams v Pure Oil Company 78 SW2d 929, 931 (Court of Appeals 1935). The Defendant in his counter suit claims selectivity and discrimination and introduced documentary evidence subsequent to 1983 supporting such claims. The Plaintiff's 1983 suit was directed to the use of an out-building, their 1988 suit was directed to cars on Defendant's property. Therefore, the trial court was obligated to ascertain whether there existed genuine issues as to any material fact of identity of issue,

subject matter, relief sought and cause of action. And whether the supporting document dated June 27, 1985 forming the basis of Defendant's counter suit could support a cause of action in 1983, 2 years prior to its creation. A judgement is res judicata only if the present facts and condition at the time of judgement and cannot hold as to future condition or matter raised subsequent to judgement. Cowling v Colligan 312 SW2d, 943 (Texas 1958). The granting of a summary judgement on the principle of res judicata is an error by the trial court.

Plaintiff's proof for partial summary fails to show that any issue in Defendant's counterclaim was fully and fairly litigated in the prior 1983 suit. In the absence of identical issues collateral estoppel will not hold as a bar to Defendant' counterclaims. Valley International

Properties, Inc. v Brownsville Savings & Loan Association 581 SW2d 222,226 (Civ.-App.-Corpus Christi-1979).

"Insofar as collateral estoppel might apply to the instant suit the general rule is that collateral estoppel also operates to prevent a question of law or an issue of fact which has once been litigated and adjudicated in a court of competent jurisdiction from being relitigated in a subsequent suit between the same parties..." Olivares v Broadway Hardware, Inc. 564 SW2d 195, 198 (Civ.App.-Corpus Christi-1978) ref. n.r.e.

A similar holding is made in Watson v Wisehart 258 SW2d,350 (Civ.App.-Galveston-11953) (in part).

"We have examined...the other three suits involving enforcement of the restriction in the addition...of these two were dismissed. The other suit did not

involve enforcement of a restriction against the use of property in the addition for business purposes. Certainly it was not held in the (prior) suit that the restriction had been canceled or terminated (the issue now before the court)...said (prior) suits were neither res judicata... nor did the judgement work any estoppel by judgement."

The law is clear and well established as outlined above and the Plaintiff has made no showing of proof consistent with law that could entitle them to a partial summary judgement on the basis of collateral estoppel. No issue of Defendant's counter suit could have been or was adjudicated in 1983 and the trial court's ruling is in error. The Plaintiff's allegation that Defendant's counterclaims are barred under statute of limitation is not applicable. Rule 97 of Texas Rules of

Civil Procedure and Article 16-069 of Texas Civil Practice and Remedies Code provides that a party to an action may file a counterclaim even though as a separate action it would be barred by limitation if such counterclaim arose out of the same transaction or occurrence. The Plaintiff's 1983 suit involved deed restriction enforcement. The Plaintiff's 1988 suit addressed deed restriction enforcement. The Defendant's counterclaims allege selectivity and discrimination in the enforcement of deed restriction arising out of the Plaintiff's 1983 and 1988 suits and are therefore valid counterclaims arising out of the same transaction unaffected by statute of limitation. The duration between transactions are not stated in the statute, but is generally interpreted to be flexible and "may comprehend a series of many occurrences but

upon their logical relationship." Moore v New York Cotton Exchange, 270 U.S. 610, 46 S. Ct. 361 (1926). Further the Association signed a document (TR-23) June 27, 1985 granting the identical privilege to another which they deny Defendant by their 1983 law suit and by the signing of that document matured Defendant's counterclaims when he became aware of it in March 1987, negating Plaintiff's claims to bar by the statute of limitation. To further negate such claims the discovery rule states that a statute of limitation barring an action runs from the date the nature of the injury was discovered and not from the date the act occurred giving rise to the injury. Hays v Hall 488 SW2d, 412 (Texas-1972). To be entitled to summary judgement the burden is upon the Association as movant to negate the pleading of such rule by proving that there is no genuine issue

of fact concerning the maturity of Defendant's claims. Zale Corp. v Rosenbaum 520 SW2d, 899 (Texas-1975). No such proof was presented by the Association. The fact and law indicate that the trial court's ruling granting partial summary judgement was in error. Additionally in deciding whether or not there exist issues of material facts precluding summary judgement, evidence favorable to the non-movant should be taken as true and every inference must be indulged in favor of the non-movant. Gibbs v General Motors Corp. 450 SW2d, 827 (Texas-1970). The Association was not entitled to partial summary judgement as there existed genuine issues of material fact as to whether Defendant's counterclaims were barred as to cause of action, issue, relief or subject matter raised earlier and whether the statute of limitation will hold as a bar over the

discovery rule. Or whether, in fact, any issue was or could have been raised in the 1983 suit.

The Court of Appeals is mistaken to conclude that a cause of action which arose in June 1985 could have been presented as a counterclaim in 1983, two years before its occurrence. The Texas Supreme Court has held that a cause of action comprises both the existence of a right and facts sufficient to constitute a claim for relief. Linken Hoger v American Fidelity 260 SW2d, 884, 886 (Texas-1953). No element of Appellant's counter claims could have been raised in 1983. Neither res judicata, collateral estoppel, or statute of limitation is a bar to Appellant's counterclaims. By March 1987 the Appellant became aware that the Association's action was selective as evidenced by the document signed in June 1985 which

was presented to the trial court (TR-445). Under Texas Discovery rule Appellant's cause of action accrued when he learned of the document signed in June 1985 and was then able to seek relief. See Weaver v Witt 516 SW2d, 792, 794, (Tex.Sup.-1977), also Bayouth v Lion Oil Co. 671 Sw2d, 867,868 (Tex.Sup.-1984), Miller v Dickerson 677 SW2d, 253, 257-58 (Civ.App.-1984) ref. n.r.e. The Court of Appeals erred in affirming the judgement of the trial court when there existed genuine issues of material fact which should preclude the granting of summary judgement also the absence of similarity in cause of action, issues, subject or relief sought. And further whether an action may be filed two years before the cause has materialized. The Court of Appeals is in error.

Assignment of Error #8

The Court of Appeals erred in overruling

Appellant's eighth and third points of error by misrepresenting the facts stated in the record and misapplication of the law.

On December 15, 1989 the Association filed a third motion for sanction (TR-525) alleging that the Defendant abused the discovery process by failing to allow inspection of property, by seeking to inspect the books and records of the Association and failing to appear for deposition. In his response (TR-552) Defendant stated the orders issued ten months earlier by the 61st trial court was void and unenforceable and that the 80th trial court failing to issue any current or valid order was without authority to grant any sanction or default on Plaintiff's allegation of failure to allow inspection relative to discovery. To do so would be to issue a default judgement on a void and

improper order. Further, failing to exceed a void court order and complying to the extent possible, the payment of $200-.00 attorneys fee (TR-104) is not an abuse of the discovery process under Rule 215. Points of error 1 through 3 provide adequate support for this argument and is referred to here to avoid duplicity.

In their third motion for sanctions the Association complained that the Defendant abused the discovery process by seeking to avail himself of a statutory right under Article XV of the Association's bylaws (TR-523) which states that records may be inspected by any member at any time during normal business hours. On July 21, 1989 Defendant obtained an order compelling the Association to produce its records (TR-203). Yet the Association failed to make the records available at any time during normal business hours. On

August 9, 1989 the Defendant requested inspection and set out a visitation schedule (TR-280) with Brenda Tolleson, president of the Association, only to have them revised (TR-281) without prior consultation with the Defendant. Instead, Mrs. Tolleson selected the time that the books would be available. This is contrary to statutory provisions and implies that the records are unavailable at any other time except as determined by Mrs. Tolleson. Further, Mrs. Tolleson sought to make the records of the Association available at the convenience of her husband necessitating a second motion to produce. Defendant's motion to extend discovery (TR-277) and rebuttal to Plaintiff's response (TR-301). Nothing in the action of the Defendant constitutes an abuse of discovery to any degree. The Association, through Mrs. Tolleson, has abused the discovery process

by resisting to produce the books and records. Mrs. Tolleson operates a business from her home where the records are maintained, and is available to present the records for inspection. See (2nd Sup.TR-6) answer to Question #20 Interrogatory of Brenda Tolleson. See Texas Society v Fort Bend Chapter. It is inconceivable that a party may be sanctioned for pursuing a statutory right and no authority has been found to support this. The corporate records of Boudreaux Civic Association is not the property of the Tolleson family and seeking to inspect them is not an abuse of discovery or an act subject to sanctions or default. The Defendant has a clear right to the records during normal business hours, meaning he may select the day to inspect and any time between 9:00 a.m. and 5:00 p.m. Monday through Friday and not at the option of

Mrs. Tolleson. The trial court abused its discretion in ruling that the Defendant abused the discovery process. In fact, the Plaintiff is more deserving of sanction than the Defendant.

The Association further alleges that Defendant abused the discovery process by failing to appear for a deposition. The Defendant frequently makes business and personal trips outside the state of Texas for duration of up to ninety days. On September 17, 1989 Defendant left Houston for a three-week visit to Florida and later learned that on the 25th of September counsel for Plaintiff had sent some correspondence. These letters were received on Monday, September 25, 1989 by an acquaintance. (1st Supplemental Transcript, p16A). The letters requested an appearance for deposition on September 28, 1989. The Defendant returned Wednesday,

September 27, 1989 and reviewed the request for items to be produced at the deposition the next day. Many of these were not readily available and Defendant was not prepared for deposition or able to retain counsel on such short notice. The Defendant advised Plaintiff's counsel by letter on September 27, 1989 (TR-598) that he could not appear because of the late notice. This was acknowledged on September 28, 1989 (1st Supplemental Transcript P-16A). No further request was made. On December 15, 1989 Plaintiff submitted its third motion for sanction complaining that the Defendant had abused discovery by failing to appear for deposition. There was ample time, two and one half months, to reschedule another deposition if Plaintiff considered one paramount; but chose instead to litigate this suit on sanctions rather than merits of fact and law. De-

fendant's failure to attend was co-incidental due to his absence from Houston. A response was made on his late return. This is not an abuse of discovery. Similar cases have been treated more appropriately than the granting of a default judgement. There was no refusal or disregard to be deposed. All other cases where there has been a default for failure to appear, the events are demonstratively different. Several attempts to depose were refused, no response to notices were made, Wiley v Browning 670 SW2d 729 (Tex.-App.-Tyler 1984); also Ida E.Downey v Aquamarine 701 SW2d 238 (Texas 1985), agreements were made then rescinded. The facts situation are undeserving of sanctions in the case at hand, contrary to the treatment of a default judgement other courts have held that such penalty should not go to the extent as to relieve the

Plaintiff of the burden of proving the alleged matter of their claims. Snowden v Republic Supply Co. 239 SW2d 201 (Civ.App. Dallas 1951) ref. n.r.e. A similar holding appears in Rodenbaugh v Beachum 576 SW2d 143 (Civ.App.-Waco, 1978) ref. n.r.e. The sole consideration of the lateness of the notice would make the granting of sanction improper. In Brohmfalk v Linwood 742 SW2d 518 at 520 (Civ.App.-Dallas 1987) the court held that four days notice was scant to appear for a deposition. More so if the party is out of the state at the time. Three days is therefore inadequate and sanctions on such late notice is improper. The trial court abused its discretion in granting a default judgement. In both Rodenbaugh and Snowden it was held that the trial court abused its discretion in imposing sanction because there was no evidence that Appellant's wilfully refused

to be deposed. This was the first and only request for deposition of Defendant and the trial court's action is unreasonable and arbitrary.

In Slavin v Plano Savings & Loan Association 711 SW2d 281 (Tex.App.-1986) ref. n.r.e., the Court of Appeals held that the trial court abused its discretion in striking Appellant's claims and granting default judgement against him based upon his failure to appear for deposition which was noticed and subsequently rescheduled. The court held that "only the most aggravating of circumstances warrants (the ultimate sanction) granting a default judgement for abuse of discovery process." There was never an aggravating circumstance in this case. The Defendant was notified while out of the state, drove in the day before the scheduled deposition and without time to collect requested

documents and retain counsel. He notified Plaintiff's counsel that he was unable to appear because of the late notice. In this situation a default is not warranted. After the Defendant's pleading was struck, a court ordered deposition was rescheduled for January 11, 1990, thus giving the Defendant adequate notice to prepare and retain counsel for a proper appearance. The court's action is therefore unjustified and demonstrates an abuse of discretion.

In reviewing Appellant's point of error eight, the Court of Appeals misrepresented the facts and the law as on pages 11 and 12 of their opinion. Initially a non-profit corporation does not operate under the Texas Business Corporation Act and as such is not a controlling factor in Appellant's request to inspect the Association's books and records. Appellant has

a statutory right under Texas Non-Profit Corporation Act, Article 1396:2.23(b) and Article XV of the bylaws of the Boudreaux Civic Association, Inc. The record before the Court of Appeals shows that (TR-280) Appellant agreed to a visitation schedule on August 19, 1989 which was altered on August 20, 1989 (TR-281) by Brenda Tolleson without consultation with Mr. Cox who appeared for inspection on the days and at the times that remained unaltered by Tolleson. The court has failed to identify any law or rule that defines the exercise of a statutory right as harassment or failure to exercise that right as a sanctionable act. See (TR-277) (TR-301). The Court of Appeals has also misrepresented the facts as set out in Appellant's brief page 26, and the supplemental transcript (STR-16) and (STR-16A). The Appellant stated that he received notice on Septem-

ber 25, 1989 to appear for a deposition three days later on September 28, 1989. And that he advised the Association's attorney on September 27, 1989 (TR-598) that he could not appear because of the late notice which he acknowledged September 28, 1989 by return receipt. (1st Supplemental Transcript page #16A). Three days notice is not considered reasonable or adequate. the Dallas Court of Appeals considered four days inadequate. Brohmfalk v Linwood 742 SW2d, 518, at 520. The trial court is authorized to impose sanctions that are just, Rule 215, T.R.O.C.P. The trial court exceeded its authority when it granted sanction without reviewing the mandatory request upon which the sanctions are authorized. No sanctions are authorized for failing to do what was not required in a court order. No sanctions are authorized for exercising a statutory

right. No sanctions are authorized for failure to appear for deposition upon three days unreasonable notice. The court has failed to identify or define which of Appellant's motions and responses are frivolous and why they are considered so. The rule requires that courts shall presume that all pleadings and motions and other papers are filed in good faith. The trial court has instead granted sanctions (TR-549) without good cause and failed to state the particulars in the sanction order regarding the filing of frivolous motions, Rule 13 T.R.C.P. Watkins v Pearson 795 SW2d, 257, 260 (Civ.App.-1990). The Court of Appeals has misplaced the facts and the law in overruling of Appellant's third and eighth points of error. The granting of the third order for sanctions and striking Appellant's pleading was unjust. The court has failed in its

duty to examine the facts as they appear in the record and apply the proper law.

Rodenbaugh v Beachum 576 SW2d, 143 (Civ.App.-1978) ref. n.r.e.

Slavin v Plano Savings & Loan 711 SW2d 281 (Civ.App. 1986) ref. n.r.e.

Texas Society v Fort Bend Chapter 590 SW2d 156 (Civ.App. 1979) ref. n.r.e.

General Motors v Lawrence 651 SW2d 732 (Tex.Sup. 1983)

Ray v Beene 721 SW2d 876 (Civ.App. 1986) ref. n.r.e.

Assignment of Error #9

The Court of Appeals erred in overruling Appellant's ninth point of error by misstatement of the facts and misapplication of the law requiring judges to recuse themselves on grounds of personal bias.

On February 9, 1990, Defendant filed a motion (TR-691) to recuse Judge Powell from sitting before this cause. A hearing

was held before a visiting judge, Judge Putnam Reiter, on February 26, 1990 (TR-802) which was denied. On November 17 and 20, 1989, Defendant appeared before Judge Powell when it became apparent that Judge Powell had become accustomed to attorneys representing litigants and had developed a personal bias and prejudice concerning a party representing himself. To the degree the Defendant felt that so pervasive a disposition would reasonably impair Judge Powell's ability to exercise a fair and impartial trial. On November 17, 1989 his statement that Defendant "go get an attorney or lose your house" was evidence of a bias. Three days later on November 20, 1989 Judge Powell's statement, "I am not about to waste my time or anyone else's time," was demonstratively one of disdain. His further statement that the Defendant is "playing games" further reinforces the

presence of bias and prejudice towards parties representing themselves. Not once, but twice, three days apart did the judge express his bias as an ultimatum contrary to law. Rule #7 Texas Rules of Civil Procedure, directing a party to be represented by an attorney abridges that party's right to represent himself. Ex Parte Shaffer 649 SW2d, 300 (Texas-1983). The standard for determining whether a judge should recuse himself is whether a reasonable person knowing all the facts would conclude that his impartiality might reasonably be questioned. Not only is such a statement prejudicial, it implies a foregone conclusion without proper judicial examination. Norton v State 755 SW2d 522 (Texas App.-1988). Judge Reiter, a visiting judge, abused his discretion in denying Defendant's motion. The hearing was a mere ritual. The court reporter of

Judge Powell's court was not on duty and usually not on duty at these hearings such as to allow proper documentation of these statements by the judge. Only a moron would expect Mr.Dillon or any party of the Association to admit that the judge was prejudiced or make any statement implying such. On every occasion the judge ruled in favor of the Association. The impropriety is blatant in his order granting partial summary judgement on November 17, 1989 and his order granting sanction January 5, 1990.

The Court of Appeals had a duty and the authority to scrutinize the ruling of the trial court, Aldridge v State 342 SW2d 104 (Crt.App. 1961), and to correct and compensate such injustice. The entire record should have been reviewed as this case is tainted with improprieties and irregularities (TR-719).

Under Rule #7 T.R.C.P. any party to a suit may appear and defend his right in person if he so chooses. Additionally Rule #18 provides that judges shall recuse themselves in proceedings in which they have a personal bias or prejudice concerning the subject matter or a party. The judge made his prejudice and bias unquestionably clear to the degree that Appellant concluded that so persuasive a disposition would impair the judge's ability to exercise an impartial trial. The judge's order to "go get an attorney or lose your house" was contrary to Appellant's rights and indication of a preconceived outcome of this suit against the Appellant. The judge's statement that, "I am not about to waste my time or anyone else's time," demonstrates that the Appellant's appearance before Judge Powell was a waste of his time. Judge Powell holds an elected

public office with no authority to select whether he will hear a pro se litigant or an attorney or whether same is a waste of his time. The Texas Supreme Court has upheld a party's right to represent himself.

This court has a duty to examine the ruling, rather scrutinize the ruling of the trial court for improprieties, bias or prejudice as the Court of Appeals should have done rather than conclude that the judge's statements were taken out of context (Opinion-page 16). The court's ruling on every occasion was in favor of the Association. See (TR-337), (TR-363), (TR-425), TR-486), (TR-549), (TR-735). Mr. Cox, the Defendant in the trial court filed a motion to recuse (TR-691) to preserve this complaint, the hearing is located at (TR-802). The judge's statements were made over a three day period and

cannot therefore be considered out of context. The Court of Appeals is in error in concluding such.

Assignment of Error #10

The Court of Appeals erred in affirming a permanent injunction by the trial court when there exists no proof or evidence of damage or violation of a deed restriction as set out in Appellant's tenth point of error.

It is fundamental that no injunction be issued by any court unless evidence supporting same is produced and heard. The party seeking an injunction must plead facts which would entitle him to injunctive relief and offer evidence which would prove current or imminent damage. Sun Oil Company v Whitaker 424 SW2d 216 (Texas-1968). The Plaintiff's petition fails to state any fact that if it were proved true would constitute a violation of the deed

restriction entitling them to relief. The deed restriction (TR-10) prohibits inoperable cars in the subdivision. The Association identifies Defendant's cars and by statement only attributed an inoperable condition. No measure of test has been produced or demonstrated, neither has the Association presented the basis for their determination. Only one condition, namely, inoperability, if proven, would entitle the Association to injunctive relief. Neither infrequent use or unlicensed conditions are prohibited by the deed restriction, neither so of any make, model, color or year designation is prohibited. Neither is the appearance of a car prohibitive or in any way definitive of inoperable for purpose of injunctive relief. See Statement of Facts page 20, line 12. Question by Leary Cox (Defendant), "How did you determine those cars to be inoper-

able?" Answer by Mrs. Tolleson (Lines 13-22), "Well, the general appearance and whether or not they are registered and licensed and are street worthy by the State of Texas.... then it is assumed to be inoperable." It is apparent that this action was brought on the basis of an assumption. Mrs. Tolleson's testimony further supports this point of view, Statement of Facts, page 31 lines 17-24. Question by Leary Cox, "When you made an inspection of the cars on my property, where were they located?" Answer by Mrs. Tolleson, "I did not inspect the cars on your property, Mr. Cox. I am not a mechanic. I am not capable of inspecting the cars." The record establishes that the Association is without right to an injunction because it fails to prove an inoperable condition of Defendant's cars that would entitle them to relief. The Supreme

Court has held that, "Writs of injunction should not issue on mere surmise" but that applicant has the burden of offering some evidence which establishes a probable right to recovery. Millwright Local Union #2484 v Rust Engineering Co. 433 SW2d 683 (at 687) (Texas 1968). The trial court erred in its ruling granting the Association a permanent injunction without a showing of actual or imminent damage. Mother and Unborn Baby Care of North Texas, 689 SW2d 336 (Civ.App. Fort Worth-1985) writ dismissed. A probable injury may not be speculative or conjectural or based upon fear, assumption or apprehension. The facts and the trial court's ruling are in conflict and it has abused its discretion. If the evidence shows no intention in fact or the existence of a violation on the part of the Defendant in support of the Association's petition, the

injunction should have been denied.

A party seeking injunctive relief must plead and prove entitlement to such by offering proof of current of imminent damage. The Association has failed to prove the inoperable condition they claimed violated the deed restriction. As a result the trial court denied any civil damages which is consistent with failing to prove ones case. And the granting of a permanent injunction is improper in this case. The Court of Appeals has overlooked page 68, lines 3 through 8 of the statement of facts. The trial judge stated an inoperable condition was not proved. An injunction should not be granted. And the Court of Appeals is in error by affirming such an injunction.

Assignment of Error #11

The Court of Appeals erred when it affirmed the trial court's granting of at-

torney fees when such award is not authorized except in conjunction with an award of damages and the violation of a deed restriction.

It is well established that attorney fees are not recoverable in an action except when provided for by statute or agreement New Amsterdam Gas Co. v Texas Industries, Inc. 414 SW2d 914 (Texas-196-7). City of Dallas v Arnett 762 SW2d 942 (Civ.App.-1988).

On March 30, 1990 the trial court granted the Association attorney fees in the absence of any evidence supporting a contractual agreement or statutory provisions. Further, the granting of attorneys fee is dependent upon whether the Association has proven a valid claim upon which the court's judgements can stand. Jaylor Textiles v Pacific Compress Warehouse 547 SW2d 738 (Civ.App.-1977) ref. n.r.e. as

set out in point of error 10, the Association failed to prove a right to recover damages. The trial court specifically denied any civil damages (see Finding of Fact #7 (TR-778), consequently there should be no award of attorneys fee. The same holds true for exemplary damages. The Supreme Court has stated that there were no actual damage is shown, there can be no recovery. Flanagan v Womack 54 Texas. 45, Trawick v Martin Brown Co. 79 Texas 460, 14 SW2d, 823. It follows therefore that the Association is not entitled to any recovery, exemplary award or attorneys fees. Because the issue of a permanent injunction is improper and the Plaintiff was denied civil damages the award of attorneys fees is an abuse of discretion. The trial court did not find a breach of the restrictive covenant.

The record shows that no violation of

the deed restriction occurred, the Association failed to prove their case and was denied any damages. See finding of fact #7 (TR-778). As a general rule, attorneys fees are not recoverable except where a violation of the restriction is shown. The trial court stated that an inoperable condition was not proven and the award of attorneys fees is improper. Freedman v Briarcroft Property Owners 776 SW2d, 212 (Civ.App.-1989); also Taylor Textiles v Pacific Compress Warehouse 575 SW2d, 738 (Civ.App.-1977). Only a breach of a restrictive covenant would entitle the Association to attorneys fees. The Court of Appeals is in error to affirm such a ruling by the court below. See also Townplace Homeowners Association, Inc. v McMahon 594 SW2d, 172 (Civ.App.-1980) ref. n.r.e.

Assignment of Error #12

The Court of Appeals erred in affirming the trial court's findings of fact when there is no evidence to support such finding. The facts and the law are contrary to the court's finding as set out in Appellant's point of error twelve except for finding of fact #7.

The trial court's statement in finding of facts #1 (TR-776) stating that Leary Cox engaged in discovery abuse by failing to allow Plaintiff to conduct a mechanical inspection of two vehicles is not supported in the record. Initially the Plaintiff failed to submit a proper request and has presented no evidence that they did. The Plaintiff(s) visited Defendant's property and made their inspection as ordered on January 20, 1989 and March 30, 1989. See the affidavit of Ashna Campbell (TR-753) and affidavits of Brenda

Tolleson (TR-73 & TR-74). At no time was the Association denied opportunity to make their inspection. Plaintiff's Exhibits 2-8, photographs were taken by the Plaintiff on January 20, 1989 in Defendant's back yard. Exhibit P-5 shows Mr. Dillon standing to the left rear of the vehicle on Defendant's property conducting his inspection. See Statement of Fact page 7 lines 17 through 25 and page 8 lines 1 through 5.

Finding of Facts #2 states that Defendant violated two court orders commanding a mechanical inspection. No order issued in this suit refers to a mechanical inspection and the Plaintiff has failed to identify or produce any such order. The 61st Court issued an order authorizing one inspection on January 20, 1989 and another on March 31, 1989, (TR-66) and (TR-114). A mechanical inspection was never request-

ed or granted in this cause.

Finding of Facts #3 is without substance. As a member of the Boudreaux Civic Association, Leary Cox has a statutory right to inspect the books, records and papers of the Association at any time during normal business hours as set out in Article XV of the bylaws of the Association (TR-523) and as provided under Texas Non-Profit Corporation Act, Article 1396.-223 (TR-524). The Court of Appeals again failed to state the nature of the abuse. When a party satisfies a statutory right there is no abuse of discovery in doing so.

The trial court has made no ruling to the effect that any motion or response filed by the Defendant is frivolous nor has the trial court named any such motion or response. Such a finding is absurd. Motions and responses are the vehicles

used to bring issues before the court. As set out in Rule 13 T.R.C.P. courts shall presume that pleadings, motions and other papers are filed in good faith. No sanction shall be imposed except for good cause the particulars of which MUST be stated in the sanction order. The Defendant is unable to find any particulars in any order supporting Finding of Fact #4. This is contrary to the facts in the record.

Failing to appear for a deposition upon three days notice is not an abuse of discovery. The required standard time is ten (10) days and the court's finding is improper as set out in point of error #8 and incorporated here by reference.

The record demonstrates that Findings of Fact #6 is not supported by items 1 through 5. Neither individually or collectively do they constitute good cause

for a default judgement, but represents an arbitrary and capricious ruling by the trial court and wanton disregard for justice.

The court's finding of Fact #7 is proper.

However, Finding of Fact #8 is contrary to evidence in the record. The Defendant testified that his vehicles are operable and the Plaintiff has not proven otherwise. See Statement of Facts page 65, lines 1 through 4.

There is no violation of the deed restriction and therefore nothing to abate. See Statement of Fact page 51, lines 20-22.

Finding of Fact #9 is not supported by the record. No evidence exists that indicates a violation. Point of error #10 has outlined the impropriety of the issuing of a permanent injunction and is in-

corporated here by reference.

As a general rule attorneys fees are not recoverable in prosecuting a suit except provided by law or contract. In the absence of any breach of the restrictive covenant, award of attorneys fee is improper. Freedman v Briarcroft Property Owners 776 SW2d, 212 (Civ.App.-1989).

The Court of Appeals failed to state where in the record a mechanical inspection was ordered, neither date, page or line is referred to, but affirms the trial court's finding of fact. Or where any evidence is located confirming that a proper request was presented to the trial court, forming the basis of order awarding sanctions. The Court of Appeals has failed to state its own finding supporting that of the trial court.

In its first finding of fact, the court failed to state what evidence estab-

lished that Appellant prevented the Association from making its inspection.

In affirming the second finding of fact the Court of Appeals has failed to identify the location of any order instructing Appellant to allow a complete inspection, including a mechanical inspection.

In affirming the third finding of fact the Court of Appeals has failed to identify any rule or law that prohibits a statutory right to inspect the books and records of a non-profit corporation by any of its members.

In affirming the fourth finding of fact the Court of Appeals has failed to identify any motions or responses deemed frivolous by court order in which the particulars of such motion or responses are stated for purposes of sanction in accordance with Rule(s) 13 and 215 T.R.-

C.P.

In affirming the fifth finding of fact the Court of Appeals has misrepresented the fact that Appellant's notice for deposition was untimely and unreasonable and three days is insufficient notice to be considered a discovery abuse for failure to appear for deposition.

In affirming the sixth finding of fact the Court of Appeals has failed to apply the facts on record with applicable law and overrule the trial court's findings of facts one through five. No evidence exists to support such findings by the trial court, and do not constitute good or just cause for a default judgement.

In affirming the trial court's eighth finding of fact the Court of Appeals has failed to show that Appellant did violate the deed restriction, and that there was

anything to abate. And by its ninth finding of fact that a permanent injunction was necessary. The judgement of the Court cf Appeals should be reversed in all respects.

Assignment of Error #13

The Court of Appeals erred in overruling Appellant's thirteenth point of error when the trial court's conclusion of law is misplaced and not supported by the facts as they appear in the record.

The trial court is authorized under Rule 215 of T.R.C.P. to impose sanction under specific conditions and is limited to such sanctions that are "just" and only when a failure to comply with discovery rules has occurred and some harm has been caused to the Plaintiff. And that failure to comply is willful and protracted. The trial court's conclusion of law No. 1 fails to elucidate the intent or the prac-

tice of Rule 215, and throughout this case has exceeded the limits of discretion authorized by this rule. Ray v Beene 721 SW2d, 876 (Tex.App.-1986) ref. n.r.e. No element of the court's order of January 5, 1990 is just when unauthorized. Neither is conclusion of law #2 granting a permanent injunction in the absence of existing or imminent damage to the status quo. Such injunction effectively alters the status quo rather than restores it, when no violation has been found. The facts establish no basis for a permanent injunction. No recovery to Plaintiff is authorized by any statute or contract except the Plaintiff has pleaded and proven entitlement to such recovery of cost or attorneys fee. Which they have failed to do. Statement of Facts page 22 lines 10 through 25. Mrs. Tolleson's testimony states that the Defendant's cars were not

offensive or inoperable. Question by Leary Cox, "Do you consider these (Plaintiff's Exhibits 5 & 6) to be offensive relative to paragraph 6?" Answer by Mrs. Tolleson, "No."

Question by Leary Cox, "Do you consider them inoperable?" Answer by Mrs. Tolleson, "I said the assumption is that they are inoperable if they are not licensed or inspected in the State of Texas...."

Question by Leary Cox, "Is there any damage to the appearance of those cars?"

Answer by Mrs. Tolleson, "There is no question about the appearance."

The court's ruling is also in favor of the Defendant. See Statement of Facts page 68, lines 3 through 8.

The court: "Mr. Dillon, I am going to stand by my ruling, but I will tell you and the Civic Association, too, that I

think the term "inoperable automobile" was not proved. And it also means a mechanical condition not an unlicensed condition."

A permanent injunction may not be issued on an assumption. This action was therefore not based upon a, or any, breach of the restrictive covenant as the facts above indicate. It follows that the award of attorneys fees and cost is improper under Section 5.006 of the Texas Property Code.

Townplace Homeowners Association, Inc. v McMahon 594 SW2d, 172 (Civ.App.-1980) ref. n.r.e.

Neither the deed restriction relevant to this action or Texas Rules of Civil Procedure provides for award of attorney fees or cost based upon the assumption of a breach of a restriction. The court has produced no such provision.

The Court of Appeals has failed to show that the action of the trial court was just and proper in ordering sanction without the mandatory prerequisites for such order, for granting sanction for one's failure to do what was not ordered by the court and to state what law defines the exercise of a statutory right, harassment or a sanctionable act. The court has not shown any frivolous motions or responses or complied with Rule 13 T.C.P.R. to state the particulars of such motions and response, or show where a three day notice to appear for deposition is considered reasonable and adequate. The court is in error to find a breach of the deed restriction as the basis for a permanent injunction. The record shows no breach, only that the suit was brought on the basis of an assumption. See Statement of Facts, page 22, lines 10 through 25, page

68, lines 3 through 8. A permanent injunction should not be issued on an assumption. Additionally the Court of Appeals has failed to reverse an award of attorneys fees when no breach of a restriction has been proven. The court's conclusions of law are not supported by the facts in the record and inconsistent with law relevant to those facts.

The judgement of the Court of Appeals should be reversed.

Assignment of Error #14

The Court of Appeals erred when it denied Appellant's timely motion for leave to supplement the record and introduce letters which it said were proper request before the trial court.

On May 10, 1991 Appellant filed a second motion for rehearing and motion for leave to supplement the record with three

letters which the Court of Appeals in its opinion of March 14, 1991 assumed were proper request attached to (respondent's) the Association motion and presented to the trial court. And on such assumption overruled Petitioner's points of error one and two. (Opinion page 8).

Mr. Cox, Petitioner, contends that the letters were not part of the record before the trial court, that they were not attached to the Association's motion and that they were defective by failing to meet mandatory requirement of Rule 161(1)c. And as such the trial court acted beyond its authority when it granted sanction against Defendant Cox. In his original motion for rehearing, Mr. Cox pointed to his diligence in bringing sufficient records for review and directed the Court of Appeals to evidence in the Association's motion confirming his com-

plaint that the letters were defective. And to review the record rather than engage an assumption as was done by the Court of Appeals in Smith v Southern Land Development Co. 385 SW2d 557-558 (Civ. App.-Houston-1964). In that case the Appellant refers to a letter that was not in the record. However the Court examined the record for evidence of the content of the letter, "but found that there was nothing to show the contents of such letter or that the terms thereof were agreed upon." The direction here is that the court may use what information that is apparent in the record in determining the content of a letter not part of the record. The motion was overruled in spite of the evidence in Appellee's motion showing the defect in the letter the Court claims to be proper. The Court elected to engage an assumption rather than accept

the obvious evidence in the record and has created an unusual circumstance. Both Rule 428 and Rule 429 Texas Rules of Civil Procedure authorize the Court of Appeals to permit amendment of records at or after submission if it will enable the Court to decide the case. "If the Appellate Court considers the omitted matter to be material it shall permit it to be filed." Because there was other evidence appearing in the record which was not considered, the Appellate Court must in the alternative consider the presence of the letters material under Rule 428; but failed to permit them to be filed by denying Appellant's motion for leave to supplement the record. Rule 428 is applicable when Appellant has brought forward full and sufficient record for his appeal to be considered and disposed of on the merits but the appellate court feels it needs addi-

tional information which is material to a thorough and accurate decision.

Copies of the letters present added evidence of identical character, not new evidence and would alleviate any reliance upon an assumption. The court's action in denying Appellant leave to supplement the record is in error.

Because the trial court had (1) a mandatory obligation to award sanction only upon failure to comply with a proper request; (2) a mandatory obligation to ascertain that a proper request was executed.

The Court of Appeals is in error to affirm such mandatory obligations on assumption. The supplementation of the record would not delay the disposition of the case since the content of the letters were already included in Association's motion (TR-45).

Assignment of Error #15

The Court of Appeals erred by its failure to address a sub point on page 4 of Appellant's brief when it overruled Appellant's Point of Error #1, said sub point addresses the need to prove relevance and materiality in seeking discovery. Wooten v American Motorist Ins. Co. 570 SW2d 572 (p

* * * *

SUMMARY:

In summary, Petitioner would urge this court to rule in his favor by holding that the trial court had a mandatory obligation to consider the prerequisites of the sanctions be awarded and that the content of the motion considered should have alerted him to the impropriety of the award. And that it is unjust to award sanction until the commitment of a sanctionable act. Additionally, Mr. Cox' failure to set up times for inspection is

not a sanctionable act as requested in the Association's motion. In this regard the sanctions are unauthorized and improper. In considering the trial court's order authorizing inspection this court should hold that the order was inadequate and incomplete to sufficiently inform Mr. Cox of his obligation, and the order's failure to specify its objecting and manner of inspection rendered it vague and unenforceable. Also, that the frame of the order amounted to a prohibited search for a cause of action since the Association had already filed their lawsuit alleging inoperability, they must have previously made such determination and should only be permitted to present the facts and evidence employed in determining the inoperability of Mr. Cox' vehicles. The Association made no prior test and testing subsequent to filing this suit would amount

to a prohibited search for a cause of action disguised as discovery. The second motion and order for sanction were identical to the first, and they brought about no change. The Association then embarked on a magnanimous scheme to obtain sanctions against Petitioner. This court should hold that Mr. Cox has a statutory right under the bylaws of Boudreaux Civic Association and the exercise of such right under court order is not harassment nor sanctionable. Also that neither the 61st or 80th District Courts have ruled any motion or responses made by Mr. Cox to be frivolous and no particulars appear in the sanction order as required by Rule 13. Further that three days notice for deposition is inadequate and the Association was notified of Mr. Cox' inability to appear because of the late notice. This court should also hold that the striking of

Petitioner's pleadings and the entry of a default judgement was improper, unjust and unauthorized beyond the provision of Rule 215 and that the trial court's judgement be reversed as set out in Petitioner's prayer for relief. Likewise, this court should hold that exhibits may optionally be attached to a motion but are not instrumental in moving the court to action. Motions are therefore the controlling documents and when the content of a letter is transcribed into the motion, the exhibit letter is of little effect in moving the court to its decision. The Court of Appeals is in error in ruling the Appellant's record was incomplete to show reversible error.

Finally, the trial court issued a permanent injunction on the speculation that Defendant might in the future violate the deed restriction. An allegation that

was disproved at trial. Also awarding attorneys fees, cost and post judgement interest in the absence of any award of damages, statutory or contractual agreement. It is apparent that this case is perforated with improprieties and irregularities.

In conclusion, the trial court's findings of facts are contrary and unsupported by the facts determined at trial, neither is the court's conclusion of law, which are greatly misplaced.

PRAYER FOR RELIEF

WHEREFORE, this Supreme Court having the duty and authority to make and render the proper judgement that the trial court should have made and for this and all the reasons set forth above.

(1) Petitioner prays that this court will reverse the judgement of the trial court granting a permanent injunction

and awarding attorneys fees and cost and render same be dissolved and denied. And that all and total cost be charged against the Plaintiff, Boudreaux Civic Association, Inc.

(2) Petitioner prays that the Partial Summary Judgement entered against him on his counter claims be REVERSED AND REMANDED for trial on its merits.

(3) Petitioner prays that this court issues an order mandating the trial court to vacate its protective order and release all documents for inspection by Defendant Leary Cox.

(4) Petitioner prays that this court will issue an order directing Boudreaux Civic Association to produce unconditionally its books and records for inspection by Defendant as set out in Article XV of the Association's by-laws. Or in the alternative direct

the trial court to so issue an order.

(5) Petitioner prays that this court will issue an order directing Boudreaux Civic Association to refund $200.00 to Defendant Cox paid to them in compliance with an improper court order. Or in the alternative direct the trial court to so issue an order. And that same be paid within fifteen (15) days of signing of such order.

(6) Petitioner prays that he be granted all of any further relief general and specific, at law or in equity to which he may be entitled.

Respectfully submitted,

/s/Leary Cox
26106 LaFouche
Tomball, Texas 77375
713/351-7865

D-1171

LEARY COX	§	IN THE
	§	SUPREME COURT
vs	§	
	§	OF THE STATE
BOUDREAUX CIVIC	§	TEXAS
ASSOCIATION, INC.	§	
et al	§	

PETITIONER'S MOTION FOR A REHEARING ON APPLICATION FOR WRIT OF ERROR

Now comes Leary Cox, Petitioner in the above entitled and numbered appeal and move this court for a rehearing on petitioner's application for writ of error and in support thereof would show that the errors committed by the Trial Court and Court of Appeals amounted to a denial of petitioner's personal, property and constitutional rights. And that this Supreme Court has a duty to reverse such judgement by the Trial Court and affirmation by the Court of Appeals when their action contravenes established precedents in law, rules

of civil procedure established by this Supreme Court, statutory privileges granted by act of legislature and judicial protection under state and federal constitution. To this end the action and decision of the lower court clearly violates the rights and privileges afforded petitioner under Articles 3, 3a and 19 of the Constitution of the State of Texas. Also, under U.S.C.A. constitutional amendments 5 & 14 § 1983 & 1981 of the Federal Constitution. Petitioner would show specifically that:

1.) he was denied due process of law and that a constitutional right may not be abridged thereby.

2.) the award of sanctions and judgement without a hearing and compliance with mandatory rules of civil procedure and well-established precedents of law is a denial of due process.

3.) the courts' actions are arbitrary, selective and discriminatory and that such actions failed to safeguard petitioner's procedural due process, leading to an improper judgement.

4.) that the errors complained of herein are of such significance and magnitude as to warrant reversal.

On June 24, 1988 the association filed a complaint against petitioner Cox alleging deed restriction violation because he maintained unlicensed cars on his property. The deed restriction prohibited "inoperable cars" and petitioner answered by verified special exception which requires to association to prove the allegation.

1.) The trial court disregarded this established procedural treatment to the disfavor of petitioner. As set out in assignment of error #1 of

petitioner's application for writ of error and incorporated here for all purposes by reference and in the interest of brevity.

2.) On January 16, 1989 trial court signed an order awarding sanction when it had no authority to do so unless a mandatory request was submitted in accordance with Rule 167(a) Texas Rules of Civil Procedure (TRCP) which the association failed to do. Again the trial court failed to comply with established procedure and denied due process of law to petitioner.

3.) On January 16, 1989 the trial court awarded sanction against petitioner without a proper hearing which is a mandatory requirement prior to the award of sanction. In spite of petitioner's request (TR 49) that no

ruling be made until a proper request was submitted and petitioner Cox made his response within the thirty days allowed under TRCP Rule 167(1). The court has denied petitioner Cox due process by signing an order for sanction without a hearing, without a proper request and prior to any sanctionable action on his part. TRCP requires notice and hearing and neither may be waived or denied by the trial court. Cox was not notified, or represented or attended any hearing prior to the signing of the sanction order on January 16, 1989. It is apparent that the trial court's action is arbitrary. This matter was brought to the court's attention in defendant's motion to deny Plaintiff's second motion for sanction (TR 85) and Defendant's motion for sanc-

tions and order to produce documentation (TR 95). Petitioner Cox filed a motion for oral hearing which was denied February 27, 1989 (TR 113). To uphold such action would infringe on Cox's due process rights to a hearing on facts that may impact the outcome of a trial. This is a constitutional right and may not be denied whether by intent or oversight. The trial court by signing a second order for sanction displays a total disregard for the rules of court.

4.) On August 30, 1989 the trial court again denied petitioner Cox due process of law when it signed an order denying Cox the statutory right to inspect the books and records of the non-profit association of which he is a member as set out in assignment of

Error #4. Further, Judge Smith recused himself on three days notice contrary to T.R.C.P. Rule 18A, an established judicial rule. Another instance of due process of law denied to petitioner Cox, on November 11, 1989, Judge Powell granted summary judgement against Cox when his counter claims were not barred by res judicata, collateral estoppel or statute of limitation since Cox' claim arose in 1985, they could only be filed subsequent to 1985, not before. The action of the court is against all precedents in similar instances. And the entry of a default judgement without the support of fact to justify same is a miscarriage of justice and a denial of due process. Additionally it was disclosed at the trial that no violation

of the deed restriction was found, and to issue an injunction that Cox might violate the restriction in the future, such an injunction is improper. The injunction is a denial of petitioner Cox' rights to free use of property. The court's treatment is a departure from due process. This court should determine whether the action of the trial court and court of appeals are consistent with the preservation of a constitutional due process privilege and whether the action by the courts reflects acceptable and uniform treatment. To present the errors of this case concisely, petitioner Cox had a default judgement entered against him on a fictitious complaint, and had sanctions imposed improperly in violation of the rules of court. The second

order of sanction was also improper, since the first order was unauthorized, and unenforceable. Also, Cox was not required to allow a mechanical inspection if it was not ordered. The inspection of the association's books and records is a statutory right, not discovery abuse, neither is failure to appear for a deposition on three days notice. The court's conduct is in question when such proper routine procedures are readily abandoned to prejudice petitioner. It is obvious that petitioner was treated differently to deny him equal protection. It appears that so much cannot go wrong by accident but by intent and this case should be reconsidered and reversed upon rehearing.

PRAYER FOR RELIEF

WHEREFORE, this Supreme Court having the duty and authority to make and render the proper judgement that the trial court should have made and for this and all the reasons set forth above.

(1) Petitioner prays that this court will reverse the judgement of the trial court granting a permanent injunction and awarding attorneys fees and cost and render same be dissolved and denied. And that all and total cost be charged against the Plaintiff, Boudreaux Civic Association, Inc.

(2) Petitioner prays that the Partial Summary Judgement entered against him on his counter claims be REVERSED AND REMANDED for trial on its merits.

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and release all documents for inspection by Defendant Leary Cox.

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(5) Petitioner prays that this court will issue an order directing Boudreaux Civic Association to refund $200.00 to Defendant Cox paid to them in compliance with an improper court order. Or in the alternative direct the trial court to so issue an order. And that same be paid within fifteen (15) days of signing of such order.

(6) Petitioner prays that he be granted all of any further relief general and

specific, at law or in equity to which he may be entitled.

Respectfully submitted,

/s/ Leary Cox

* * * *

No. 01 90 00657

LEARY COX, Appellant	*	IN THE COURT
	*	OF APPEALS
V.	*	
	*	FIRST JUDICIAL
BOUDREAUX CIVIC ASSOCIATION, INC.	*	DISTRICT
	*	
	*	FOR THE STATE
	*	OF TEXAS

APPELLANT'S MOTION FOR STAY OF MANDATE

TO THE HONORABLE COURT OF APPEALS:

Now comes Leary Cox, appellant in the above styled and numbered cause and moves this court for an order to stay the issuance and delivery of mandate pending disposition by the United States Supreme Court decision on writ of certiorari. On September 5, 1991 the Texas Supreme Court denied appellant's application for writ of error noting writ denied. Inherent in the

notation is the dissatisfaction with this court's judgement to warrant no reversible error. The court's failure to address the issues of this case sanctions such departure from judicious conduct as to warrant supervision by the United States Supreme Court. The judgement requires appellant to pay $22,000 in attorneys fee which is beyond his ability to pay and unjustly empower the court to supervise by injunction the use of his property.

Wherefore, appellant prays that this court issues an order staying the issuance of a mandate until disposition of his writ of certiorari before the United States Supreme Court. A copy of this motion has been sent to Mr. Stephen Dillon, 7322 Southwest Freeway, #825, Houston, Texas 77074; by return receipt certified mail dated October 30, 1991.

Respectfully submitted,

/s/Leary Cox

* * * *

No. 01-90-000-657

LEARY COX	§	IN THE COURT OF APPEALS
vs	§	1ST JUDICIAL DISTRICT
BOUDREAUX CIVIC ASSOCIATION, INC. et al	§	FOR THE State OF TEXAS

Appellant's Motion to Re-open and Correct the Judgement in this Case

To the Court of Appeals:

Now comes Leary Cox, Appellant in the above styled and numbered cause and moves this court to reopen this case to correct an erroneous judgement. On September 16, 1991 the Texas Supreme Court denied appellant's application for writ of error noting writ denied. Indicative in this notation is that the Supreme Court is not sufficiently satisfied with the judgement of this court to endorse it "no reversible error." This court now has jurisdiction to correct the judgement.